



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI, MILIMANI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 241 OF 2005

AGEM LIMITED.....PLAINTIFF

VERSUS

CHARTERHOUSE BANK LIMITED....DEFENDANT

JUDGEMENT

1. At all material times to this Dispute, Anthony Ambala Kegode was a Director of both Agem Limited (the Plaintiff herein or Agem) and East African Safari Air Limited (EASA). The latter being a Company that operated Charter Planes into and out of Mombasa, Zanzibar, Malindi and Dar-es-salam.
2. Because of expansion of its routes to Europe, EASA sought to increase its working capital in Italy and approached Charterhouse Bank Limited (the Defendant or Charterhouse) for a short-term financing arrangement. This involved an overdraft facility in Italy guaranteed by Charterhouse through its overseas counterparties. As security for the facility, Mr. Kegode's family agreed to offer a property owned by Agem (a Family Company) in Lower Kabete being LR. No.7158/117 (the suit property). This facility is referred to as the principal facility.
3. In addition, Charterhouse issued guarantees (on 30th July 2003 for USD 90,000 and 28th August 2003 for USD 110,000) in favour of Kenya Shell for liabilities arising from fueling of EASA's planes in Kenya by Kenya Shell (The Shell guarantee).
4. The above facilities were offered through a Letter of Offer dated 4th September 2002 with a limit of USD 416,000/=. The Bank guarantees were to expire on 31st December 2003.
5. In respect to the Principal facility, Charterhouse was to give an overseas guarantee to cover EASA's facility at Banca Popolare Di Intra (hereinafter also referred to as the Italian Bank). As Charterhouse did not possess the necessary Central Bank of Kenya authorization to issue overseas guarantees it contracted Co-operative Bank of Kenya (Coop Bank) as its local correspondent Bank to manage and issue the Italian Guarantee.
6. At the request of EASA, Charterhouse instructed Co-operative Bank to issue the Italian Guarantee through a letter of 10th June 2003 (D Exhibit 1 page 35). The Guarantee was for USD 350,000 which was to expire on 6th June 2004 but was subsequently extended to 13th June 2004 (D Exhibit 2 page 5C).
7. The evidence by Mr. Kegode was that towards the end of the term of the Italian Guarantee, he, speaking as a Director of Agem, advised the Defendant that there should be no further extension of the

guarantee upon its expiry. This would be because he was disposing off his shares in EASA to a new buyer and he did not want the buyer to ride on a facility guaranteed by a Family Asset. But contrary to his instruction, Charterhouse authorized a renewal of the guarantee.

8. With regard to the Kenya Shell guarantee, it is Agem's case that on 2nd June 2004 Agem directed Charterhouse to offset US\$ 165,156.30 (P Exhibit page 19) from Mr. Kegode's personal Account so as to substantially reduce the liability of US\$200,000. Subsequently Mr. Kegode issued personal instructions for this account. This is in a letter dated 8th June 2004 (P Exhibit page 25) and in the same letter he offers to personally pay the difference of US\$ 34,843.10.

9. Again Charterhouse failed to effect the transaction and instead it claims that a Letter was written to it on 4th June 2004 by EASA (D Exhibit 1 page 54) demanding the return of the said amount from Kegode's account to the account of EASA.

10. Separately, it is common ground that a charge for Kshs.37,000,000 over the suit property was registered in favour of the Charterhouse on 24th June 2004 (P Exhibit page 1-6 and D Exhibit 1 pages 6-34).

11. In an Amended Complaint dated the 22nd June 2005 Agem asserts that the notice dated 7th February 2005 addressed to it by Charterhouse demanding payment of US\$ 522,411.70 is unlawful, null and void for reasons inter alia, that;-

- a. The said Notice does not provide the dates when the alleged liabilities were called up and paid.
- b. The said Notice does not state the dates of default by the Principal debtor.
- c. The said notice does not show the notification of default of the Principal debtor.

Charterhouse is further criticized for issuing a 3 months Notification of Sale on 8th February 2005 (P Exhibit pages 33-34).

12. Ultimately Agem seeks the following prayers:-

- i. Orders by way of injunction to restrain the Defendant, by itself, its servants, agents or otherwise from offering for sale, selling and from transferring, taking possession of, or otherwise dealing or in any way interfering with the rights of the Plaintiff to its property known as L.R 7158/117 as herein precisely identified and for such other interlocutory and permanent injunction as this Honourable Court deems appropriate.
- ii. A Declaration that the guarantees are void.
- iii. An order that the Defendant whether by itself by its servants or agents or otherwise do discharge and re-convey the said properties free from any charge and the Defendant failing to do so that the Registrar of this Honourable Court do execute all such documents as may necessary to discharge the said charge.
- iv. An order that the Defendant whether by itself by its servants or agents or otherwise do hand over to the Plaintiff all the documents of title in respect of the said parcel of land duly discharged.
- v. Costs
- vi. Any such further or other relief deemed just by this Honourable Court.

13. In a Statement of Defence dated 15th June 2005, Charterhouse takes a position that a demand and a call up was made on the Italy Guarantee on 28th May 2004 by the Italian Bank on Amex and sets out the

following sequence of events:-

a. EASAL wrote to the Defendant Bank by an undated letter received on 26th May, 2004 requesting for the conditions on which the Italy Guarantee could be renewed or in the alternative the amount owed in order to have the securities discharged and I quote from the said letter “*Please let us have the conditions by which we could review the (Italy Guarantee) for a further term, or in the event that we do not wish to renew the same, a statement of the funds needed to discharge our securities*”.

b. Amex sent a SWIFT message to Cooperative on 28th May, 2005 demanding payment on the Italy Guarantee in the event that the same was not renewed and I would request the Honourable Court to note the wording of the demand which I quote “...missing the extension this message is to be considered as a claim under your guarantee no. G4107 to this purpose we hereby claim the payment of USD350000.00...”.

c. EASAL and the Plaintiff separately wrote to the Defendant Bank on 2nd June, 2004 advising, inter alia, that the Shell Guarantee and the Italy Guarantee should not be renewed and that the said Fixed Deposit held as security therefore should be transferred from the EASAL’s account to Kegode’s account. Both these letters were received together by the Defendant Bank on 5th June, 2004.

d. Without informing or seeking instructions or authority from the Defendant Bank, Cooperative sent a SWIFT message to Amex on 7th June, 2004 advising Amex to extend the validity of the Italy Guarantee to 13th December, 2004.

e. Amex replied by SWIFT message to Cooperative on 9th June 2004 advising that the Italy Guarantee had been renewed as per Cooperative’s request. A copy of this communication was received by the Defendant Bank on 10th June, 2004.

f. Upon realizing that Cooperative had purportedly and without the authority of the Defendant Bank, renewed the Italy Guarantee the Defendant Bank wrote to Cooperative on 15th June, 2004 advising that the Italy Guarantee should not be renewed.

g. Cooperative then sent a SWIFT message to Amex on 16th June, 2004 (with a copy to the Defendant Bank) advising Amex not to renew the Italy Guarantee which message was communicated to the Beneficiary by Amex.

h. The messages culminated with a SWIFT message from Amex to Cooperative on 14th September, 2004 claiming that the actual amount due and payable under the Italy Guarantee was US\$322,411.70 and this was communicated to the Defendant Bank on 15th September, 2004.

14. It is averred that Coop Bank has in fact filed suit against Charterhouse being High Court Civil case No. 121 of 2005 (**Cooperative Bank of Kenya Ltd vs. Charterhouse Bank Ltd**) claiming the shortfall in the said accounts.

15. The Defendant asserts that the demand and call on the Italy Guarantee was made on 28th May 2004 before its expiry and the Bank was obliged to make the requisite payment without the beneficiary having to justify or prove the debt.

16. In respect to the Shell Guarantee Charterhouse asserts that :-

i. It holds the sum of US\$ 166,186.49 in the account of Kegode which was transferred from account of ESAL upon the written instructions of Kegode.

ii. It is estopped from applying those funds by virtue of an Order of Court made in High Court Civil

Case No. 345 of 2004.

17. Charterhouse makes a Counterclaim of US\$ 200,000 together with interest thereon from 8th September 2004 at the prevailing market rates until payment in full. The Bank also claims a sum of Kshs.322,417.10 together with interest thereon from 17th August 2004 at the prevailing market rates from time to time applicable until payment in full.

18. The Court proposes to evaluate the evidence in detail as it determines the issues that present themselves for determination. The parties are not agreed as to those issues but they would be the following:-

- i. Whether the Principal Debt crystallized so as to trigger the Italian Guarantee.
- ii. Whether or not a full Tender of the amount claimed under the Kenya Shell Guarantee has been made.
- iii. Whether or not the Charge registered on 24th June 2004 is lawful and valid.
- iv. Is Agem deserving of the Prayers in the Amended Plaintiff?
- v. Is Charterhouse entitled to the Prayers in the Counterclaim?

19. At the heart of this dispute are three Bank Guarantees designated 593/03, 456/02 and TFBG 03039. An issue that requires an early resolution is an argument by Agem that none of the Guarantees giving rise to attempted foreclosure of its property possess the necessary enforcement competence.

20. Agem makes reference to a Notice to Produce Documents dated 14th November 2011 which was served by its Advocates upon the Advocates for Charterhouse and which, it is common ground, was not responded to. That Notice reads:-

NOTICE TO PRODUCE DOCUMENTS

TAKE NOTICE that the Plaintiff herein requires the Defendant to produce the following documents in the Defendant's possession, custody and power within a period of 14 Days from the date hereof for inspection and taking of copies;

- i. Original Bank Guarantee 598/03 – East African Safari Air Limited – USD 110,000.000 dated 28th August 2003 (Referred to in Annexure SS 7 & SS 13 of the Defendant's Replying Affidavit dated 30th May 2005).
- ii. Original Bank Guarantee 456/02 – East African Limited – USD 90,000 dated 19th July 2002 (Referred to in Annexure SS 7, 8 & 13 of the Defendant's Replying Affidavit dated 30th May 2005).
- iii. Original Guarantee NO. TFBG 03039 for USD 350,000.00 in favor of Banca Popolare Di Intra (Referred to in Annexure SS 13 of the Defendant's Replying Affidavit dated 30th May 2005)

TAKE FURTHER NOTICE that if you do not produce the aforesaid documents as requested, we shall proceed and move the Court for relevant orders.

DATED at NAIROBI this 4th day of November 2011.

Signed

OKOTH & KIPLAGAT

ADVOCATES FOR THE PLAINTIFF

21. It is submitted by Counsel for Agem that:-

“It is clear that since the Italy Guarantees and the Shell Guarantees were required to be stamped for purposes of the stamp Duty Act failure to produce the actual or copies of the stamped guarantees is fatal to D’s case”

22. So as to make out what could turn on the failure by Charterhouse to produce the Documents as bespoken, it is necessary for this Court to first establish the provisions of the Law under which the Notice was produced.

23. On the face of it, the Notice to produce does not cite its host provision. In its submissions, there is an attempt by Agem to rely on Section 69 of The Evidence Act which reads:-

“Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

- (i) when the document to be proved is itself a notice;
- (ii) when from the nature of the case, the adverse party must know that he will be required to produce it;
- (iii) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (iv) when the adverse party or his agent has the original in court;
- (v) when the adverse party or his agent has admitted the loss of the document;
- (vi) when the person in possession of the document is out of reach of, or not subject to, the process of the court;
- (vii) in any other case in which the court thinks fit to dispense with the requirement”.

24. The interpretation to be given to this Section is that proposed by Charterhouse. A party that issues a Notice to Produce under Section 69 is presumed to be in possession of the secondary evidence and so gives notice to the Party in whose possession or power in the document reposes that if it shall not produce the originals then the issuing party will be at liberty to rely on the copies (Fatuma Zainabu Mohamed vs Ghati Dennitah & 10 others [2013] eKLR).

25. Even if accepted that the Notice was made under the auspices of Section 69, it must be presumed that Agem was well aware that it had copies of the originals. If the case for Agem was that the originals infringed some provisions of law and therefore invalidated them then the onus was on Agem to produce the copies in proof thereof.

26. However from the wording and format of the Notice, this Court must reach a quick decision that it is the typical form contemplated under order X Rule 15 of the pre-2010 Civil Procedure Rules which were

in force at the time it was made. Order X Rule 15 then read:-

“Notice to any party to produce for inspection any documents referred to in his pleading or affidavits shall be in Form No.7 of Appendix B, with such variations as circumstances may require”.

27. The Notice served by Agem was for inspection and taking of copies. It then warns, in closing, that in the event that the request is not acted upon then Agem will move Court for relevant Orders. This is exactly what order X Rule 17 requires a party who is faced with intransigency is expected to do. The Rule provided:-

(1) where the Party served with a notice under Rule 15 omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of this advocate, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit:

Provided that the order shall not be made when and so far as the Court shall be of the opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party: and the Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

28. It is not disputed that Charterhouse did not oblige to the request. Yet it is equally true that Agem did not make the desired application. Only then would the Court consider whether Agem was entitled to inspect copies of the Documents that they are in possession or power of Charterhouse and that the inspection and making of copies is necessary for fair disposal of the suit or for saving of costs. Having failed to do so Agem cannot shift the blame to its adversary.

29. Agem had partly, pleaded a case that it did execute or properly execute the Shell Guarantee. However, by failing to follow through the Notice to Produce, it lost the opportunity of invalidating the Guarantees on account of execution. The Court proceeds on the assumption that upto the date when they were to expire both the Italian and Kenya Shell Guarantees were valid.

The Italian Guarantee

30. At the request of EASA, Charterhouse, through a letter of 18th June, 2003, instructed Coop Bank to issue a Bank Guarantee of USD 350,000.00 to the benefit of the Italian Bank (P Exhibit 35). The expiry date of the Guarantee was 6th June 2004. There is no controversy that the same was issued and its term extended to 13th June 2004. See the Plaintiff and the evidence of Jimmy Mulwa who testified for the Bank when he said,

“A valid Demand was made on 28th May 2004. No extension given after 13th June 2004”.

31. On 2nd June, 2004 (P Exhibit page 19), Agem wrote to Charterhouse as follows:-

2nd June, 2004

Charterhouse Bank Limited

P O Box 43252

6th Floor

Longonot Place

Kijabe Street NAIROBI

Attn.: Mr. Sanjay Shah

Dear Sanjay,

I have been directed by the board to provide you with the irrevocable instructions not to renew the following:-

1. Guarantees to Kenya Shell Limited, expiring on the 31st July 2004 for US\$90,000.00 and US\$110,000.00 respectively.
2. Guarantee to our bank in Italy, Banca d'Intra for US\$350,000.00 expiring on the 30th June 2004.

If necessary, apply the margin held of US\$ 165,156.30 (United States Dollars One hundred sixty-five thousand one hundred fifty six and thirty cents only) to the favour of Mr. Anthony A. Kegode of P O Box 28321, Nairobi, Kenya.

You are further instructed that any other directions in connection with our securities will be on our sole instructions only.

Faithfully and sincerely yours,

AGEM LIMITED

Signed

AA KEGODE

MANAGING DIRECTOR

A Similar letter of the same date was written by EASA to Charterhouse (P Exhibit page 18).

32. Two highlights of the Letters are that there was express instruction from both EASA and Agem that both the Italian and Kenya Shell Guarantees should not be renewed. Secondly both letters reached Charterhouse on 5th June 2004.

33. In a Letter of 15th June 2004 (P Exhibit 20) Charterhouse writes to Co-op Bank advising them not to renew the Guarantee as per "our customer instructions". This letter was received by Coop Bank on 17th June 2004. Both dates are after the expiry of the Guarantee.

34. On 18th June 2004 (P Exhibit page 22), Agem makes a follow up letter. That letter is important enough to deserve an entire reproduction:-

18th June 2004

The Manager

Charterhouse Bank

Longonot Place

Nairobi

For the Urgent attention of Mr. S. B. Pillai, Manager Cred

RE: Bank Guarantee facilitating East African Safari Air's overdraft facility with Banca Popolare d'Intra.

Dear Sir,

I am writing to inform you that the Bank Guarantee you have had upto to 13th June 2004, for facilitating East African Safari Air's overdraft facility with Banca Popolare d'Intra should not at this stage be renewed (our, and East African Safari Air's recent letters to in this respect refer).

The Guarantee as you know expired on the 13th June 2004 and we have been reliably informed that there may have since been a renewal of the same. If this is the case, then there has been an error or oversight, which needs to be immediately addressed. I would like to therefore notify you that if indeed there is renewal of the 'old' Guarantee in this respect: Charterhouse Bank should immediately have it cancelled and withdrawn.

Agem Limited, who have in the past provided securities to Charterhouse Bank for the facilitation have already advised you (and we hereby do reiterate) to the effect that the securities of this Company that were in place will not be available as collateral to allow the extension of the said Guarantee beyond its date of expiry.

We have been made aware that East African Safari Air's account is currently in credit as of today. By copy of this message, East African Safari Air have already advised Banca Popolare d'Intra to make certain that from now on, the account is not overdrawn on the basis that there is a bona fide renewed Guarantee in place from yourselves secured by Agem Limited.

Please be advised that Agem Limited will not take any responsibility for any credit which may be extended to East African Safari Air's conduct of their account with Banca d'Intra Popolare, if such draw date is done beyond the date of the said Guarantee's expiry.

Kindly urgently confirm by return that you have understood this message, and that the necessary has indeed been done.

Best regards,

AGEM LIMITED

Signed

ANTHONY KEGODE

MANAGING DIRECTOR

35. On the same day EASA fires a similar warning to the Italian Bank (P Exhibit page 21).

36. Upto there, there is succinct evidence that prior to the expiry date of 13th June 2004, Agem and EASA had given clear instructions to Charterhouse not to renew the Italian Guarantee. Again this was reiterated on 18th June 2004 (P Exhibit pages 22 and 23).

37. The bedrock of Agem's case is that at the date of expiry of the notice being 13th June, 2004, no liability accrued in the account of EASA at the Italian Bank and that the account was infact in credit. Charterhouse on the other hand asserts the debt for which the Guarantee was taken accrued on 28th May 2004 when Co-op Bank sent a swift message (D Exhibit page 6(a) demanding payment from

Charterhouse on the Italian Guarantee in the event that the same was not renewed.

38. For purposes of deciding whether Agem was liable to Charterhouse, it has to be determined whether as at 13th June 2004, the date of expiry of the Guarantee, any liability accrued from EASA to the Italian Bank. The evidence of Mr. Kegode was at the expiry there was no liability in the Italian Bank. Pointing to what he says was the Bank Statement of EASA's account, it was his evidence that as at 15th June 2004 the account was in credit of 3926.11 Euros (Plaintiffs Supplementary Bundle of Documents). The same documents however shows that as at 11th June, 2004 the account was in debit of Euros 101,293.63 and as at 14th June a debt of 96,079.89.

39. The reaction of Charterhouse is multiple pronged. The first is to doubt the authenticity of the Statement of accounts allegedly because they do not belong to the Plaintiff (perhaps EASA) and as being uncertified. Yet as observed by Counsel for Agem there was no objection by Charterhouse both at the pre-trial stage and during the hearing as to their admissibility. Further in the course of cross examining Mr. Kegode, Counsel for Charterhouse does not raise questions about the origin or authenticity of that statement. This Court finds, on the balance of probabilities, that the Statement is that of the account held by EASA in the Italian bank.

40. The Bank also points out that deposits of USD 100,000 and USD 93,841.00 (I would think the Deposits are in Euros) were made on 15th June 2004 after the expiry of the guarantee and were soon utilized by EASA. It is further argued that the deposit was for USD 93,841.60 yet the indebtedness of EASA to the Italian Bank was USD 350,000. But in determining the viability of this argument it is necessary to establish the nature of the account of EASA with the Italian Bank. The argument by Charterhouse presupposes that the facility extended by the Italian Bank to Agem was a loan and the Account was therefore a loan Account. If this were true then Agem would still be indebted to the Italian Bank as at 15th June 2004 notwithstanding the deposit of US\$ 93,841.60.

41. However, the evidence provided by Agem suggests that the account was a running account that was allowed to overdraw upto a limit of US\$ 350,000.00. See for example the letter of 18th June 2004 from Agem to Charterhouse in which Agem makes reference to the "*Bank Guarantee you had upto 13th June 2004 for facilitating East African Safari Air's overdraft facility with Bank Popalare d'Intra*". Mr. Kegode testifying on behalf of Agem reiterated that the Account was an overdraft Account. An ongoing facility. This evidence by the Agem was not countered by Charterhouse.

42. This Court had earlier observed that as at the date of expiry of the Guarantee (ie. 13th June 2014) EASA's account was in debit of 101,256.15 Euros and this would have to be Agem's indebtedness if the Guarantee had been called up on that day. What the narrative of Charterhouse ignores is the events that happened soon after the expiry of the Guarantee. The Bank statement shows that as of 18th June, 2004, the account was in Credit, an issue emphasized by EASA in its email to the Italian Bank. The closing words of the email are,

"I have been advised that the account is currently in credit, as of today, please make certain that from now on, the account is not overdrawn on the basis that there is a renewed Guarantee in place, or until you can confirm beyond reasonable doubt that the securities provided thereto are not from Agem limited in Kenya"

Indeed the Credit position held until sometime on 25th June 2014.

43. The evidence is that although on 5th June 2004, Charterhouse received Agem's letter instructing that the Guarantee should not be extended, Charterhouse writes to Coop Bank on 15th June 2004 (P. Exhibit 20) advising it of the customer's position. This letter was received by Co-op Bank on 17th June 2004. There is then evidence which is not controverted, that EASA rehearses this position to the Italian Bank via an email sent on 18th June 2004 (P Exhibit 21).

44. It cannot therefore be ignored that as at 17th June 2004 when Coop Bank was advised that the expired Guarantee would not be renewed, no money was owed by the principal debtor to the Bank. In fact no debt accrued until some 8 days later. Of great significance is Charterhouse plea in paragraph 4(g) of its Defence when it states (of the advise given by it to Co-op Bank),

“Co-operative then sent a swift message to Amex on 16th June 2004 (with a copy to the Defendant Bank) advising Amex not to renew the Italy Guarantee which message was communicated to the Beneficiary by Amex”.

This Court has to observe, and must find, that Agem was entitled to take a position that it was discharged from its obligation under the terms of the Guarantee it had given to Charterhouse because, even in the worst case scenario, at the date Amex was advised that the Guarantee would not be renewed as the Account of EASA was in credit.

45. This evidence is consistent with the alternative position that Charterhouse had pleaded that, Co-operative Bank without informing or seeking instructions or authority from it sent a swift message to Amex on 7th June 2004 advising Amex that the validity of the Italy Guarantee had been extended to 13th December 2004 (paragraph 4 (d) of the Defence of Charterhouse). Clearly then there is merit in the argument by Agem that the amount demanded by Amex being US\$ 322,411.70 on 14th September 2004 was accrued post the expiry of the Guarantee it had given to Charterhouse and it would not be liable for this sum.

46. It is little wonder that the witness for Charterhouse conceded as follows in cross-examination,

“If the Charterhouse Defence and Counterclaim in 121/2005 succeeds, there will be no liability on the principal debt here in the Italian Guarantee, it would be wrong to pursue the Italy Guarantee if the 121/2005 suit would go our way”

Civil suit Number 121/2005 is a suit in which Coop Bank claims indemnity from Charterhouse to the sum of US\$ 322,411.70 being monies paid for and to the benefit of EASA allegedly at the express request of Charterhouse. In resisting that claim Charterhouse asserts, inter alia, that it did not authorize Coop Bank to renew or extend that Guarantee and if there was extension it was without the mandate, approval, authority or knowledge of Charterhouse. On that basis it lays a counterclaim of US\$ 10,804.00 from Coop Bank.

The Shell Guarantee

47. Matters here may be more straightforward. The Kenya Shell Guarantees were for a total sum of US\$ 200,000 and due to expire on 31st July 2004. On 2nd June 2004 (P Exhibit 19) Agem writes to Charterhouse as follows:-

2nd June, 2004

Charterhouse Bank Limited

P O Box 43252

6th Floor

Longonot Place

Kijabe Street NAIROBI

Attn.: Mr. Sanjay Shah

Dear Sanjay,

I have been directed by the board to provide you with the irrevocable instructions not to renew the following:-

3. Guarantees to Kenya Shell Limited, expiring on the 31st July 2004 for US\$90,000.00 and US\$110,000.00 respectively.

4. Guarantee to our bank in Italy, Banca d'Intra for US\$350,000.00 expiring on the 30th June 2004.

If necessary, apply the margin held of US\$ 165,156.30 (United States Dollars One hundred sixty-five thousand one hundred fifty six and thirty cents only) to the favour of Mr. Anthony A. Kegode of P O Box 28321, Nairobi, Kenya.

You are further instructed that any other directions in connection with our securities will be on our sole instructions only.

Faithfully and sincerely yours,

AGEM LIMITED

Signed

AA KEGODE

MANAGING DIRECTOR

This letter was received by Charterhouse on 5.6.2004.

48. On that same day EASA wrote to Charterhouse asking that some USD 165,156.30 be transferred from its account to the Account of Anthony Kegode. In a letter of 8th June 2004 (P Exhibit 25), Mr. Kegode gives the following instructions in respect to the USD 165,156.30,

8th June 2004

The Manager,

Charterhouse Bank Limited,

Longonot Place, 6th Floor,

Kijabe Street, Nairobi,

P.O Box 43252

NAIROBI

Attention: Mr. Sanjay Shah

Dear Sanjay,

Ref. United States Dollars One hundred sixty five thousand one hundred fifty six. Cents thirty (US\$ 165,156.30) in my personal account with you.

I refer to our conversations, and correspondence from East African Safari Air Limited and myself in

respect to the funds United States Dollars One hundred sixty five thousand one hundred fifty six. Cents thirty (US\$ 165,156.30) held in my account with you (also hereinafter to as the ‘funds’).

I plan to leave for the United States to attend the burial ceremony for a death in the family. I am not certain when I will return, and as a precaution, I would hereby like to give Charterhouse Bank Limited full custody of the said United States Dollars One hundred sixty five thousand one hundred fifty six. Cents thirty (US\$ 165,156.300) held in my account with you, to apply it immediately to the amount secured by Agem Limited on behalf of East African Safari Air Limited for United States Dollars two hundred thousand only [US\$ 200,000.00 – the Guarantee provided by Charterhouse Bank Limited in favour of Shell (Kenya)Limited]. For the avoidance of doubt, in the event that the said Guarantee is demanded by, and paid to Shell (Kenya) Limited, the net amount thereafter claimed from Agem Limited by Charterhouse Bank Limited would not exceed United States Dollars Thirty four thousand eight hundred forty three. Cents seventy only (US\$ 34,843.70).

I would also like to confirm that as a result of my instructions herein, I Anthony Ambaka Kegode will not have any claims for the return of the funds after their application as hereinbefore directed, PROVIDED that US\$ 200,000.00 is indeed paid to Shell (Kenya) Limited in accordance with the Guarantee’s terms. Further, I Anthony Ambaka Kegode do hereby indemnify Charterhouse Bank Limited and hold the Bank and its officers completely harmless from the effects of these directions herein in so far as legal matters or costs arising therefrom are concerned.

Kindly confirm

Faithfully and sincerely yours

Signed

ANTHONY A KEGODE

49. It is now common ground that these instructions were not effected. Why so? In paragraph 17 of the Defence, Charterhouse offers the following explanation:-

“17. It is denied by the Defendant that the Plaintiff has offered to clear and pay off the liability in respect of the Shell Guarantees and the Defendant puts the Plaintiff to the strict proof thereof and in further response to paragraphs 20, 21 and 22 of the Plaintiff, the Defendant states that:-

a. The Defendant denies that it holds an account in the name of the Plaintiff with the sum of US\$165,156.30.

b. The Defendant denies that any agreement has been made with the Plaintiff to apply or offset the “resulting liability” in respect of the Shell Guarantees by applying the sum of US\$165,156.30 in the Plaintiff’s alleged account.

c. (i) The Defendant does hold the sum of US\$166,186.49 in the account of Kegode which was transferred from the account of EASAL upon the written submissions of Kegode.

(ii) The Defendant was estopped from applying the said funds in the account of Kegode by virtue of an order of this Honourable Court made in High Court Civil Case Number 345 of 2004.

(iii) By virtue of the estoppel afore mentioned, the Defendant was not at liberty to make the alleged agreement with the Plaintiff as alleged and did not in fact make the alleged agreement and the Plaintiff is put to the strict proof thereof.

d. The Defendant is a stranger to the allegation made by the Plaintiff with respect to the payment of the sum of US\$37,873.30 and puts the Plaintiff to the strict proof thereof.

e. Due to the reasons aforesaid, no monies have been paid to or recovered by the Defendant from the Plaintiff or at all and hence demands full payment thereof and the Defendant therefore request this Honourable Court to enter judgement upon the admission of the Plaintiff for the sum of US\$200,000.00 with interest and costs”.

50. In his evidence in Chief Mr. Muiwa (for Charterhouse) states that Agem has not offered to clear and pay off the liability in respect of the Shell Guarantees. And in regard to the offer by Mr. Kegode to offset the resultant liability, the witness took the position that Charterhouse did not consent to such an arrangement nor did it hold an account in the name of the Plaintiff in the sum of USD 165,156.30.

51. In re-examination the witness testified,

“The amount in Kegode’s account was USD 165,156.30, amount demanded was USD 200,000. Amount not enough to meet liability. USD 165,156.30 – incoming CEO of East African Safari has also demanded this money page 54-D Exhibit (30.01.2011) seeking return of money to Company’s Account. Money did not belong to Kegode”.

52. Before the Court determines whether Charterhouse had good reason not to apply the USD 165,156.30 in part settlement of sums owed under the Guarantee, it must deal with one issue that has arisen in respect to this deposit. Although Charterhouse had pleaded that it was stopped from applying the said funds in the account of Kegode by virtue of a Court order made in High Court Civil case No.345 of 2004, no evidence was led in respect thereof. Instructively as well, the Court order was not amongst the Documents in the Defendants Bundle of Documents. Again, it did not feature in the Plaintiffs case. In a word it did not come up at all in the course of hearing

53. That notwithstanding, Defence Counsel makes reference to that Defence when he submits,

“The Defendants were in addition of the above stopped from applying the funds in the account of Kegode by virtue of an order of this Honourable Court made on the High Court Civil case No.345 of 2004. A true copy of the order was annexed to the affidavit of Sanjay Shah sworn in opposition to the application for Injunction and marked as Exhibit SS11”.

Confronted with the reality that the Order had not found its way into the evidence, Counsel attempts to introduce it by making reference to an affidavit filed earlier in the proceedings. However if the Defence wanted to make the affidavit or its annexures part of its substantive case, then it ought to have properly introduced it or them as Exhibits during the main hearing. This Court agrees with Counsel for Agem that this is an attempt to introduce fresh evidence at the submission stage and will not be permitted.

54. Having made that finding, the only explanation left and available to Charterhouse would be the following:-

a. It did not hold an account in the name of Agem with the sum of US\$ 165,156.30.

b. No Agreement was made with Agem to apply or offset the liability that resulted from the Shell Guarantees by applying the sum of US\$ 165,156.30 allegedly in the Plaintiff’s Account.

Further, but not expressly pleaded, Charterhouse submitted that the sum of USD 165,156.30 was not available as there was a dispute between the new owners of EASA and Kegode in respect to the Deposit. Charterhouse would be referring to the letter of 22nd June 2004 (D Exhibit 7 page 54) in which the new Managing Director of EASA, Capt Adam Ogden called for the return of the money into the Company’s Account No.FX 400119.

55. Agem has forcefully argued that Charterhouse had no legal basis for failing to apply the funds as directed by Kegode to settle the Kenya Shell Guarantee. It is the case for Agem that Kegode as an individual was also a Guarantor to the liability. In this regard Charterhouse demanded settlement of the amount due under the Guarantee from Anthony Kegode in a Demand Letter of 10th August 2004 (P

Exhibit page 28). I understand Agem to be contending that since the money was to be applied towards settling the liability of EASA, it would be strange for the Bank to refuse to transfer back the money to the account of EASA. Counsel for Agem posed the question,

“The liability for which Mr. Kegode was offering to settle is a liability belonging to EASA. How would the transfer of the funds from Mr. Kegode back to EASA’s account preventfrom applying the funds towards the payment of the Kenya Shell guarantee?

56. Is the position that straightforward? The sequence of events in respect to this amount is as follows. By a letter of 2nd June 2004 (P Exhibit 18) EASA, through its then Managing Director Kegode, instructs Charterhouse to move the money to Mr. Kegode’s personal account. In the very same letter it instructs the Bank not to renew the Shell guarantee which was to expire on 31st July 2004.

57. In a letter of the same day (P Exhibit page 18) Agem purports to give directions in respect to the money to be transferred. Agem instructs the Bank as follows:-

“...if necessary, apply the margin held of US\$ 165,156.30 (United States Dollars one hundred sixty and thirty cents only) to the favour of Mr. Anthony A. Kegode of P.O. Box 28321 Nairobi Kenya”.

The Court consciously uses the word ‘purports’ because, although Kegode was the author of the letter in his capacity as Managing Director for Agem, Agem could not lawfully direct Charterhouse on how to apply the funds of a third party, in this event, Anthony A. Kegode.

58. Anyhow, five days later, on 8th June 2004 (P Exhibit page 25) the instructions come from the person in whose account the money was held. Mr. Kegode gives the following instructions:-

8th June 2004

The Manager,

Charterhouse Bank Limited,

Longonot Place, 6th Floor,

Kijabe Street, Nairobi,

P.O Box 43252

NAIROBI

Attention: Mr. Sanjay Shah

Dear Sanjay,

Ref. United States Dollars One hundred sixty five thousand one hundred fifty six. Cents thirty (US\$ 165,156.30) in my personal account with you.

I refer to our conversations, and correspondence from East African Safari Air Limited and myself in respect to the funds United States Dollars One hundred sixty five thousand one hundred fifty six. Cents thirty (US\$ 165,156.30) held in my account with you (also hereinafter to as the ‘funds’).

I plan to leave for the United States to attend the burial ceremony for a death in the family. I am not certain when I will return, and as a precaution, I would hereby like to give Charterhouse Bank Limited full custody of the said United States Dollars One hundred sixty five thousand one hundred fifty six. Cents thirty (US\$ 165,156.300) held in my account with you, to apply it immediately to the amount

secured by Agem Limited on behalf of East African Safari Air Limited for United States Dollars two hundred thousand only [US\$ 200,000.00 – the Guarantee provided by Charterhouse Bank Limited in favour of Shell (Kenya)Limited]. For the avoidance of doubt, in the event that the said Guarantee is demanded by, and paid to Shell (Kenya) Limited, the net amount thereafter claimed from Agem Limited by Charterhouse Bank Limited would not exceed United States Dollars Thirty four thousand eight hundred forty three. Cents seventy only (US\$ 34,843.70).

I would also like to confirm that as a result of my instructions herein, I Anthony Ambaka Kegode will not have any claims for the return of the funds after their application as hereinbefore directed, PROVIDED that US\$ 200,000.00 is indeed paid to Shell (Kenya) Limited in accordance with the Guarantee's terms. Further, I Anthony Ambaka Kegode do hereby indemnify Charterhouse Bank Limited and hold the Bank and its officers completely harmless from the effects of these directions herein in so far as legal matters or costs arising therefrom are concerned.

Kindly confirm

Faithfully and sincerely yours

Signed

ANTHONY A KEGODE

59. It has to be recalled that Mr. Kegode had given a personal Guarantee individually and jointly with Elizabeth Kegode for the facility granted by Charterhouse to Agem; the Shell Guarantee being one of them. indeed Charterhouse had in a letter of 10th August 2014 (P Exhibit page 28) advised Kegode that Shell, as the beneficiary to the Guarantee, had called in payment and that Charterhouse was in the process of effecting and remitting the Guaranteed sums. Charterhouse then notified Kegode, as a Guarantor to the liability that he is personally liable for the payment made out under the Guarantee.

60. I would think that there would therefore be at least two reasons for Charterhouse to apply the sum of US\$ 165,156.30 admittedly held in the account of Kegode towards the debt that resulted from the Shell Guarantee. One, Agem's instructions that this amount be so applied was now undergirded by express instructions from the owner of the money. Second, even if the payment was not made on behalf of Agem, it was coming from a person who had guaranteed any resultant debt from the Shell Guarantee and the implication of effecting Kegode's instructions for payment would be to substantially reduce EASA's exposure under the Guarantee and by extension that of Agem.

61. The instructions by Kegode was that Charterhouse immediately applies the amount held in his account. This was on 6th June, 2004. This would be 14 days before the new Managers of EASA requested a recall of the Deposit. No reason has been proffered by Charterhouse as why it would not have applied the funds in those 14 days (between 8th June 2004 and 22nd June 2004). This Court must conclude that Agem, in conjunction with a Guarantor to the facility (Kegode), had on 8th June 2004 made sufficient arrangements to reduce any resultant debt from the Shell Guarantee by a sum of US\$ 165,156.30.

62. The Court reaches that Decision even in the face of the submissions by Charterhouse that in a letter of 18th August 2004 (D Exhibit page 47), Agem admits owing the entire debt of US\$ 200,000.00. The letter reads,

18th August 2004

The Managing Director

Charterhouse Bank Limited

P.O. Box 43252

NAIROBI

Dear Sir,

RE: KENYA SHELL

I refer to your letter of 10th August 2004 in connection with letters of guarantee to Kenya Shell for US\$200,000.00 (United States Dollars Two Hundred Thousand Only).

Without prejudice to our rights and obligations in so far as this is concerned, Mr. Anthony Kegode will arrange to make payment for the amount demanded. Please liase with him to this end.

Many thanks

Faithfully and sincerely yours,

AGEM LIMITED

Signed

AA KEGODE

MANAGING DIRECTOR

The Court prefers to read this letter in the context of the events that had preceded. As borne out by the evidence discussed earlier, Agem had proposed that the debt be reduced by applying US\$165,156.30 from the account of Kegode and Kegode had given those express instructions in his letter of 8th June 2004. I would think that in the letter of 18th August 2004, Agem was emphasizing that Mr. Kegode would be responsible for the debt demanded. This would be consistent with the arrangement that had been proposed that a substantial amount of this debt be paid by monies held with Charterhouse in Mr. Kegode's account. To construe the contents of that letter as an admission by Agem that it held itself liable for the entire debt would be to read the letter without regard to the events that had just taken place.

63. But is Agem entitled to a full discharge from the Shell Guarantee? It is common ground that Charterhouse paid the full sum of US\$ 200,000 to Kenya Shell limited as beneficiary. There is express admission of this by Agem in its letter of 1st October 2004 to Charterhouse (D Exhibit page 55). Earlier in a letter of 8th June 2004, Mr. Kegode anticipated that upon paying of US\$ 165,156.30 there would be still be an exposure of US\$ 34,843.70. Agem itself expressly acknowledges this position in its letter of 1st October 2004 and offers to pay this balance. This did not happen and has not happened. Agem is liable for this amount and was well aware that it was due.

64. Agem had pleaded that, so as to secure the facilities granted to it by Charterhouse, Charterhouse had taken possession of title to the suit property. Charterhouse on the other hand maintains that it took and still has a first legal charge dated 22nd June 2004 over the said property. In its pleadings (Amended Plaintiff and Reply to Defence and Defence to Counterclaim), Agem challenges the validity of the charge on the following two grounds:-

- i. The charge document was not executed by the bonafide Directors and Company Secretary of Agem.
- ii. The charge was registered after the expiry of the alleged Guarantee period and therefore to no consideration or benefit or authority of the Plaintiff.

65. Looking at the testimony of Agem's two witnesses, I have to find that Agem abandoned its case that the charge document was not duly executed. Agem did not press this matter and offered no evidence on

it.

66. The charge was registered on 24th June 2004 (see copy of title (P Exhibit pages 1-6). The charge was to secure Agem's liability in the event of a resultant debt from both the Italian and Kenya Shell Guarantees. The Italian Guarantee expired on 30th June 2004 and that of Kenya Shell on 31st July 2004. These are dates after the charge was registered (24th June 2004). In so far as the charge was registered prior to the expiry of guaranteed periods the substratum of Agem's challenge vanishes. The Guarantees were subsisting as at the time the charge was registered and that was the consideration. It has turned out that, while Agem is no longer liable under the Italian Guarantee, there is still an existing debt that accrued as a result of the Shell Guarantee and there can be no discharge until the debt is settled.

The Court's determination

67. Agem has successfully demonstrated that it is not liable under the Italian Guarantee and is only liable to the extent of US\$ 34,843.70 with interest thereon from 18th August 2004 (when it acknowledged the demand of the debt by Charterhouse) in respect to the Shell Guarantees. However, it has failed to fault the validity of the Guarantees when they existed or the subsisting charge. The Court is therefore unable to grant any of the Prayers sought in the Amended Plaintiff.

68. On the Counterclaim, Charterhouse triumphs only to the extent that it has proved indebtedness of US\$ 34,843.70 with interest thereon. The Claim for interest is in the nature of a claim for interest antecedent to the suit. This had been pleaded by Charterhouse as required by law (see Highway Furniture Mart Limited v. Permanent Secretary Office of the President & another [2006] eKLR). As to the rate applicable reference will have to be made to the contract between the parties which comprised of the Letter of Offer and the Charge Document. The Charge Document provides that the rate of interest would be that charged by the Bank from time to time. Although the debt would have accrued interest from 18th August 2004 when Agem became aware of the demand, Charterhouse sought that interest runs from 8th September 2004. I see no reason to grant more than what was asked.

69. One other issue. Charterhouse, as would be entitled, made its Claim in foreign currency. The Judgement is expressed in foreign currency but is convertible to local currency at the rate applicable at the time of payment or of enforcement of the Judgement. (See HECO UBERRSEEHANDEL V. MAC'S PHARMACEUTICAL LIMITED [2000] eKLR).

70. The upshot is that there is only partial success on both sides and an Order of costs that endears itself to this Court is that each side meets its own costs on both the main Claim and Counterclaim.

70.1 The Plaintiffs suit is dismissed. 70.2 There shall be judgment for the Defendant against the Plaintiff for the sum of US\$ 37,873.30 with interest thereon from 1st October 2004 at the contracted rates until payment in full.

Dated, Signed and Delivered in Court at Nairobi this 6th Day of April, 2018.

F. TUIYOTT

JUDGE

PRESENT;

Akello h/b Kiplagat for Plaintiff

Kimigishi h/b Munyalo for Defendant

Nixon - Court Assistant