



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER 256 OF 2002

RIFT VALLEY AGRICULTURAL

CONTRACTORS LIMITED.....APPLICANT

-VERSUS-

KENYA WILDLIFE SERVICES.....RESPONDENT

RULING

1. Judgment in this case was delivered on the 27th July 2011 (Ouko J as he then was) in favour of the Applicant Rift Valley Agricultural Contractors in the sum of Kshs.31,500,000/=.

To secure a stay of execution pending an appeal to the Court of Appeal, the Respondent provided a bank guarantee from the Co-operative Bank of Kenya on the 27th September 2011 in the sum of Kshs.21,000,000/= pursuant to a court order dated 27th September 2011. The matter further went to the Supreme Court that delivered its judgment on the 27th April 2018 upholding both judgments of the Court of Appeal and the High Court.

Consequently, the Applicant sought to be paid the decretal sum, part of which is secured by the bank guarantee offered by the Co-operative of Kenya on the 26th September 2011.

2. It is important to state here that Co-operative Bank of Kenya Limited was not a party to the case and had no arrangements with the decree holder, the applicant, as it was sought for by the Respondent to offer the bank guarantee

3. I have looked at the Bank guarantee filed on the 27th September 2011. It was directed to the Deputy Registrar of the High Court. **The bank gave an irrevocable undertaking to pay to the Registrar of the High Court on behalf of the Judgment Debtor, the sum of Kshs. 21 Million – being the maximum liability – within (30) days of a first written demand from the court declaring the judgment debtor to be liable under court order from the High Court at Nakuru – (Paragraph 4 of the guarantee).**

4. By a court order dated the 13th April 2015 (Hon. Odero J), the bank guarantee was extended to continue to serve as security. It is therefore in force.

5. Upon delivery of the final judgment by the Supreme Court on the 27th April 2018, it follows that the Bank guarantee must crystallise and be honoured, but on condition ***“that a 30 days written demand from the court declaring the judgment debtor to be liable under court order from the High Court at Nakuru” - paragraph 4 of the guarantee.***

I have not been told that the 30 days written demand has been issued. The court ought to have been moved to issue the said demand for payment. The nature of the Notice of Motion under review and dated 10th May 2018 serves that purpose, in my considered view.

6. The matter of the Applicants not being suited was by consent resolved when a consent order by the Advocates for both parties was filed on the 30th May 2018 – **Order 9 of the Civil Procedure Rules.**

That issue having been resolved, the only other issue is whether Co-operative Bank of Kenya Limited ought to have been served with the present application.

It is urged by the Respondent's advocate Mr. Kahiga that as the orders sought shall affect the Bank if granted, it ought to have been served,

for its input.

7. When the Respondent sought for a Bank guarantee from Co-operative Bank, it was not declared that the funds for honouring the undertaking by way of the bank guarantee would be sourced or provided by the Ministry. It was purely an internal arrangement between the bank and the Respondent.

In the same breath, the Ministry was not a party to this case.

A party who gives an irrevocable undertaking to do a thing must of necessity honour the undertaking – See terms of the guarantee.

8. The respondent has urged that as a result of the above, the guarantee is not enforceable. Other than stating so in the Replying Affidavit sworn by the Legal Officer – Doreen Muthinga - on the 25th May 2018, no elaboration was offered. It is trite that he who alleges must prove, and if no proof is provided, the allegation remains as such – **Section 107-109 Evidence Act**. The bank was brought to these proceedings by the Respondent, and it gave its acceptance conditions upon which it would honour the guarantee. If it wanted to be enjoined thereto, it would have specifically demanded so before acceptance – See Paragraph 4 of the guarantee.

9. A bank while giving a guarantee to pay a debt should ordinarily not be concerned with the relationship between the parties to a suit hence no requirement to be enjoined thereto. It guarantees that liabilities of a debtor will be met in the event that the contractual obligations are met, in this case, if a demand for payment within 30 days is made.

To that extent the bank ought not be enjoined except in rare circumstances when it fails to honour the undertaking under the guarantee.

10. For the guarantee to be enforced, the bank's contractual obligations ought to be met – See Paragraph 4 of the guarantee. The maximum liability is stated as Kshs.21,000,000/=. A first written demand or payment issued by the beneficiary of 30 days is mandatory. The demand must be from the court (Deputy-Registrar). It ought to declare that the judgment debtor (Respondent) to be liable to the extent of the bank guarantee.

11. There is no evidence at all that the above pre-obligations have been met by the applicant. I have stated above that it is by a court order, pursuant to this application, that such obligations ought to be met.

Upon issuance of the first written demand for payment, there is a rebuttable presumption that liability has attached unless payment is made before the formal demand is made.

The purpose of the demand/notice is to enable the guarantor to approach the principle debtor to ascertain the truth and urge it to pay - **Kenindia Assurance Co. Ltd -vs- First National Finance Bank Civil Appeal No. 328 of 2002**.

12. Upon such demand being issued, the bank must honour the guarantee unless it has notice of fraud, misrepresentation or mistake - **Republic -vs- Commissioner of Customs Services Exparte Imperial Bank Ltd(2015) e KLR**, which is not the case here.

See Kamro Agrovot Ltd -vs- Cera Sante Animale & Others Kisumu HCCC No. 45 of 2008 where it was held that under a bank guarantee the bank is under an obligation to pay once demand has been given.

13. The Supreme Court judgment was pronounced on the 27th April 2018. By the said Judgment, the judgment of the this court delivered on the 27th July 2011 awarding the Applicant Kshs.31,500,000/= was affirmed. Under the Co-operative Bank guarantee, it was a condition that the guarantee will remain in force upto the time the intended appeal is heard and fully determined and any demand or order in respect thereof must reach the guarantor within 30 days of full determination, and unless demand for enforcement of the guarantee in writing was received, then, the guarantor would be fully released and discharged from its liability under the guarantee.

14. I have considered the above. The application under review was filed under a certificate of urgency on the 10th May 2018, fourteen(14) days after the final judgment of the Supreme Court within 30 days of delivery. The Respondent was duly served with the said application and parties appeared before the Judge on the 30th May 2018 again within the 30 days window, and on several other dates thereafter. I therefore find no sound arguments by the Respondent as averred in its Replying Affidavit, grounds of position and submissions that the guarantee sought to be enforced is unenforceable and non-existent having lapsed by effluxion of time, after the Court of Appeal judgment was delivered on the 10th October 2014.

15. It is not indispute that it is the Respondent that preferred a further Appeal to the Supreme Court, and further that the bank guarantee was extended by a court order to cover the period upto the time the Judgment of the Supreme Court would be delivered as aforesaid. It is upon hearing and making a finding on the present application that the court can authoritatively declare that the judgment debtor is liable under the court order under the Bank guarantee.

It is further by a court order that a Deputy Registrar of the High Court (as stated in the bank guarantee) can issue the 30 days demand for payment of the secured sum of Kshs.21,000,000/= by the Bank guarantee.

16. Consequently, I find no merit in the Respondent's opposition to the application. I proceed to allow the application dated 10th May 2018 in the following terms:-

1. That this court order serves as the first written demand from the court to Co-operative Bank of Kenya Limited, as the

guarantor through the Respondent, and under the irrevocable undertaking dated the 26th September 2011, to pay(deposit) to the Registrar of the High Court at Nakuru for and on behalf of the Judgment Debtor Kenya Wildlife Services the sum of Kshs.21,000,000/=(the maximum liability) within thirty(30) days of this written demand,(by this ruling) declaring the judgment debtor to be liable under court order from the High Court of Kenya at Nakuru.

2. That if there is none compliance by the guarantor, Co-operative Bank of Kenya Limited within the 30 days provided under the bank guarantee dated the 26th September 2011, the Judgment Creditor, Rift Valley Agricultural Contractors Limited shall be at liberty to take out enforcement proceedings under the Bank guarantee.

3. Each party shall bear own costs of this application.

Dated, signed and Delivered on this 5th Day of July 2018.

J.N. MULWA

JUDGE