



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 221 OF 2016

SOSPETER GITONGA NJIRU

T/A STEPPER ELECTRICAL SUPPLIERS.....PLAINTIFF

VERSUS

KENYA WOMEN MICROFINANCE BANK LIMITED.....DEFENDANT

RULING

1. The Notice of Motion dated 7th June 2016 seeks the following substantive Prayers:-

2. THAT an order do issue restraining the Defendant whether by itself, its agents, employees and/or servants from overdrawing and/or further mismanaging the Plaintiff's bank account number 1004310633 at the Defendant's Nyahururu Branch pending hearing and determination of this Application.

3. THAT an order do issue compelling the Defendant to immediately reverse the debit entry for KES 10,000,000/= made in the Plaintiff's bank account number 1004310633 at the Defendant's Nyahururu branch on 11th May, 2016 together with all entries attendant thereto pending hearing and determination of this Application.

4. THAT an order do issue restraining the Defendant from interfering with the Plaintiff's account and/selling, leasing, transferring, disposing off, or otherwise dealing with the Plaintiff's property held as security by the Defendant pending hearing and determination of this Application.

2. At all material times to the suit the Plaintiff was a duly appointed Distributor for the Nation Media Group Limited (hereafter "Nation"). Upon expansion of its territory of Distribution, sometime in January 2016, Nation requested for an additional Bank Guarantee of Kshs.10,000,000/= to back up the added business. That Bank guarantee was provided by the Defendant Bank.

3. A dispute arose between the Plaintiff and Nation. The Plaintiff complains that Nation did not implement the additional routes and on 22nd February 2016 purported to suspend the Distribution Agreement. In addition, Nation appointed two other Distributors to take over the territory previously served by the Plaintiff.

4. Further, through a Notice of 1st March 2016, Nation demanded a sum of Kshs.47,828,385.05 from the Plaintiff. This is contested by the Plaintiff. Subsequently, Nation called in the Quarantee of Kshs.10,000,000/= from the Defendant Bank. This was through a letter of 15th April, 2016. The Defendant Bank informed the Plaintiff of this Demand through a letter of 25th April, 2016.

5. It would seem that by 3rd May 2016, the Defendant Bank had not honoured the Quarantee and so Nation made a further demand on them. The Defendant Bank then fulfilled its obligation under the terms of the Guarantee and made the payments on 10th May 2016. The Defendant Bank then created a loan Account from where the sum of Kshs.10,000,000/= was paid to Nation. That Loan Account is No.1604310633. One of the Plaintiff's grievances is that this account was created without the Plaintiff's knowledge, consent or authority. The Plaintiff questions the debits made on the Account.

6. In the Plaint presented to Court, on 8th June, 2016, the Plaintiff states that the Defendant Bank unlawfully paid out the sum of Kshs.10,000,000/= to Nation when the Plaintiff had notified the Defendant of the existence of Civil Suit No. 143 of 2016, **SOSPETER GITONGA NJIRU t/a STEPPER ELECTRICAL & SUPPLIERS VS. NATION MEDIA GROUP LTD** (herein after Civil Suit No.143 of 2016) filed by the Plaintiff against the Defendant and an order made therein. The contents of this order shall be discussed in greater detail later.

7. Ultimately the Plaintiff seeks the following Orders:-

a) The reversal of the debit made on 11th May, 2016 on the Plaintiff's account for the sum of KES 10,000,000/= together with all entries attendant thereto.

b) A permanent injunction restraining the Defendant from interfering with the Plaintiff's account and/or selling, leasing, transferring, disposing off, or otherwise dealing with the Plaintiff's property held as security by the Defendant.

c) Punitive and exemplary damages be awarded to the Plaintiff as against the Defendant for breach of its fiduciary duty to the Plaintiff and for negligence.

d) Cost of this suit.

e) Any other relief or reliefs that this Honourable Court may deem just to grant.

8. For my consideration at this moment is an Application for Interlocutory Injunction and the much harkened Principles set out in **GIELLA VS. CASSMAN BROWN** [1975] EA 558 are applicable. To be deserving of an Interlocutory, an Applicant must establish a prima facie case with probability of success, show that it will suffer loss that cannot be compensated by an award of damage if an injunction is not granted and where the Court is in doubt, it will decide the matter on a balance of convenience. The Court has considered the Rival Affidavits and Submissions made herein and takes the following view of the matter.

9. The Law on Quarantees was restated by the Court of Appeal in **KENINDIA ASSURANCE COMPANY LTD VS. FIRST NATIONAL FINANCE BANK LTD** [2008] eKLR as follows:-

“For these reasons, we adopt the words of Lord Denning M.R. in the case of EDWARD OWEN ENGINEERING LTD V. BARCLAYS BANK INTERNATIONAL LTD (1978)1 ALL ER.976, in which he rendered himself as follows:-

‘All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only

exception is when there is clear fraud of which the bank has notice’.

Those words accord with those by BC Miltra, in LAW OF BANK GUARANTEES, quoted by Mwera J. in his ruling. B.C Miltra penned as follows:

“As the fulfillment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken at its face value unless the contractor can establish that the beneficiary’s stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like of which would give rise to special equities in favour of the contractor - in absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement”.

Mwera J. was troubled by a condition in the bond that all avenues towards recovery from the principal must first be exhausted before liability could attach. We do not know who drafted the performance bond. It is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security guaranteeing payment by a third party. In such cases the most important factor to consider before liability can attach is whether there has been default. Once default is established and that there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security”.

10. In a sense a Bank Quarantee is sacrosanct and will be met on demand without the need for the Bank to enquire into the rights of the contracting parties under a Contract to which the Bank was not party. Indeed in keeping with this, the Defendant Bank had made the following promise to Nation in its Quarantee of 22nd January 2016 in the following unequivocal terms;

We the undersigned in our capacity as the authorized signatory of Kenya Women Microfinance Bank Limited of P. O Box 4179-00566 Nairobi do hereby bind the same Microfinance for the sum of Kenya Shillings Ten Million only (Kshs.10,000,000/-) and we undertake to pay you, upon your first written demand declaring the distributor to be in default under the Contract without cavil or argument, any sum or sums within the limits of Kenya Shillings Ten Million (Kshs.10,000,000/-) as aforesaid, without you needing to prove or to show grounds or reasons for your demand or the sum specified therein.

11. That said, where there is a valid Court Order stopping the discharge of a Quarantee then the Court order should be respected and payment should not be made. The Plaintiff’s case is that the payment of the sums under Quarantee was unlawful because it was made in disregard of the Court Order in Civil Suit No. 143 of 2016. What are the contents of that Court Order? The Order reads:-

“1. THAT the application be and is hereby stood over to 7th June 2016 for service on the Defendant.

2. THAT in the interim, a stay of suspension of the Distribution Agreement dated 1st October, 2014 be and is hereby issued pending hearing and determination of this application.

3. THAT in the interim, an injunction be and is hereby issued restraining the Defendant from terminating the Distribution Agreement pending hearing and determination of this application”.

An important element of the Order was that the Nation was on an interim basis, restrained from terminating the Distribution Agreement. However, the Order does not restrain the Bank from honouring its obligation to Nation under the terms of the Bank Quarantee. In terms of the Quarantee the Bank was to pay to Nation the sum of Kshs.10,000,000/= upon receiving a first written demand from Nation declaring the distributor to be in default under the contract and the payment was to be made without cavil or argument. On the face of it, the obligation of the Bank arose upon such a demand and was not dependant on whether or not the contract was subsisting.

12. And I must observe that having looked at the Application and Plaintiff that gave rise to those orders it is clear that one of the grounds upon which it was premised was that Nation had recalled a Guarantee for a similar amount from another Bank, namely, Family Bank. In the affidavit in Support of that Application, the Guarantee to the Defendant Bank (Kenya Women) is mentioned but no order was requested stopping its payment. One must therefore wonder why the Plaintiff did not seek a Court order specifically restraining the recalling of or the payment of the Bank Quarantee from the Defendant Bank. I would think that given the uncompromising obligation placed on the Bank by the terms of Quatantee, the Bank could only decline to make the payment if the restraining Order categorically restrained the Bank from honouring the obligation. That should not be left to inferences or supposition!

13. It was submitted, on behalf of the Plaintiff, that the Defendant Bank was discharged from its obligation under the Quarantee because Nation had breached the Distribution Contract with the Plaintiff and this was brought to the Banks attention. Counsel for the Plaintiff cited the following passage from the Law of Guarantees both by **Geradline Andrew & Richard Miller** 2nd Edition at page 245,

“If the Creditor commits a repudiatory breach of his Contract with the Principal so that the Principal is entitled to treat the Contract as at end, the surety is also discharged from further liability.....”

But this argument may not to be available to the Plaintiff because he did not treat the Contract as at end. To the contrary one of the Prayers in Civil Suit No. 143 of 2016 seeks an Order of Permanent Injunction restraining the Defendant from terminating the Distribution Agreement. The Plaintiff was seeking to sustain the agreement not to bring it to an end.

14. This Court is unable to say that the Plaintiff has established a prima facie case that the Defendant Bank was in breach of the terms of its Contract with him when it honoured the Bank Quarantee.

15. What was to follow upon payment of the Quarantee? The Letter of Offer of 6th November 2015 made by the Defendant Bank and duly accepted by Plaintiff constitutes the Primary Contract between the Plaintiff and the Defendant Bank. The facility offered to the Bank is described as follows:-

“This multi option Loan facility will be devided into two Loan facilities of Kshs.10,000,000/- (hereafter referred to as ‘Loan A’) and 10,000,000/= (hereafter referred to as the ‘Loan B’ or collectively referred to as ‘Loan’ or ‘facility’.

Under clause 3 of the letter of offer, Loan B is stated to be a Bank Quarantee.

16. Clause 7 is on payment and has this important Sub-clause B.

“B. **Loan B** has the following repayment conditions.

(i) The total loan if Bank Guarantee is called upon in Kenya Shillings Twenty Million (Kshs.10,000,00/-)

(ii) A commission of 5% annually to be paid at the beginning of every year that Guarantee is not called upon.

(iii) Total monthly installment shall be determined once called up depending o the terms that will apply”

17. Once the Quarantee was repaid, the Bank created Loan Account No. LD1613201196. Looking at the contract between the Plaintiff and the Defendant Bank the creation of the Loan Account may have been in the contemplation of the Contract and it does not seem, prima facie, that the Bank can be faulted. The Loan Account was the devise through which the Bank was to be repaid for the sum paid out under the promise of the Quarantee. That does not seem to be a trivial answer to the Plaintiff’s contention that the Bank created the Account without authority.

18. The Plaintiff has not satisfied the first ground in **GIELLA** and is undeserving of the Orders sought in the Motion of 7th June 2016. It is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 17th day of February ,2017.

F. TUIYOTT

JUDGE

PRESENT;

Miss Mwangi for Plaintiff/Applicant

.....for Respondent/Defendant

Alex - Court clerk