IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 13 OF 1994

NATIONAL BANK OF KENYA LTD……...…..…..…….APPELLANT

AND

DEVJI BHMJI SANGHANI & JAVDA BHMJI SANGHANI t/a

SANGHANI BUILDERS…….....……..….RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Justice Shields) dated 15th May, 1991

in

H.C.C.C. NO. 2004 OF 1984)

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JUDGMENT OF SHAH, J.A

Pentax Properties Limited (Pentax) were to put up 330 houses on plot L.R. No. 209/8525, off Mbagathi Road, Nairobi. the houses were put up on this parcel of land and the estate which arose out of it is known as Ngumo Estate – Phase 1.

The respondents, who were two brothers, carried on business of building contractors at the material time under the name of Sanghani Builders. I will refer to them hereafter as "Sanghanis". The contract sum for building the said 330 houses was apparently quotes at K. Shs. 78,231,181.69 by the Sanghanis as per revised summary shown in the contract to be entered into between Pentax and Sanghanis. The tender by Sanghanis was accepted but Sanghanis were not prepared to sign the contract unless they had a guarantee for payment.

Mr. Devjibhai Bhimji Sanghani (P.W.1) told the superior court (Shields, J.) that Sanghanis went to the office of Mr. Nyammo, the chairman of Pentax (Mr. Nyammo) to discuss the guarantee for payment, on 5th July 1978. Mr. Nyammo made some arrangements with Pentax's bankers to assure Sanghanis of payment of the contract sum, as a result of which Sanghanis signed the contract for the construction of 330 houses, on 5th July, 1978.According to uncontroverted evidence of Mr. Devjibhai Bhimji Sanghani the work on the project was to commence on 1st August, 1978 and that without a guarantee or assurance of payment such work would not have commenced.

There can be no doubt that Sanghanis wished to be assured that they would be paid for the work they were to undertake. The amount involved was, by 1978 standards, colossal. It was for nearly Shs.

80,000,000/=. By any standards that was a very large sum of money in those days and it still is. It is therefore not at all surprising that Sanghanis wanted assurance as to payment.

The appellant was at the material time the banker to Pentax. Pentax was a limited liability company incorporated in Kenya and its directors at the time were:

1. Mr. F.T. Nyammo – chairman

2. Mr. J.K. Kanja

3. Hon. G.G. Kariuki

4. Mr. S.N. Muriithi

5. Mr. H.H. Awori (who is described as a ‘ sleeping director’)

These gentlemen are persons of standing in Kenyan Society. I have no reason to think otherwise than that the appellant bank would have wished to help them by assuring Sanghanis of payment for the contract, in stages.

The appellant wrote two letters to Sanghanis bankers, one dated 5th July, 1978 and the other dated 20th July, 1978 and for ease of reference as well for the interpretation of the contents. I will set them out in full:

“5th July, 1978.

The Manager,

Barclays Bank International Ltd.,

Government Road Branch,

P.O. BOX 30116,

Nairobi.

Dear Sir,

Your M/S Sanghani Builders,

P.O. BOX 11329, Nairobi

“We write to confirm that our customers m/s Pentax Properties Limited, who have signed a building contract with your above customers have made suitable banking facilities with us for development of Plot No. 209/8525, Nairobi.

Kindly advise your customers that M/S Pentax Properties Ltd. are good for the contract. Payment for work done will be direct to the contractors on production of certified Architects certificates.”

Yours faithfully,

Sgd.

T. N. GUTU

MANAGER

20th July, 1978

The Manger,

Barclays Bank International Ltd.,

Government Road Branch,

P.O. BOX 30116

NAIROBI

Dear Sir,

RE: YOUR M/S SANGHANI BUILDERS

P.O. BOX 11329, NAIROBI

We have now received a copy of the Building contract between your above customer and our m/s Pentax Properties Ltd. Our letter TNG/JKL/11/585 of 5th July, 1978 is then amended and read as follows:

"We write to confirm that our customers m/s Pentax Properties Limited who have signed a building contract with your above customers have made suitable banking facilities with us for development of plot No. 209/8525 Nairobi – Phase 1.

Kindly advise your customers that m/s Pentax properties Ltd. are good for contract. Payment for work will be direct to the contractors up to the amount of facilities our customers have with us, on production of certified Architects Certificates".

Yours faithfully,

Sgd.

T.N. GUTU

MANAGER

The appellant argues that those are not letters of guarantee or assurance and that these are letters of comfort. Mr. Oraro referred this court to Paget's Law of Banking 10th edition under the title Letters of Comfort and I quote:

"Letters of comfort from banks have been in use in commercial transactions foe some years in circumstances where a company or other entity is unable or unwilling to provide a guarantee but is prepared to offer 'comfort' to a lender in the form of an assurance as to such entity's continuing interest in or commitment to the relevant debtor".

The leading case that is referred to by the author in Paget is that of Rose & Frank Co. v. J.R. Crampton & Bros Ltd [1923] 2KB 24 in which Scrutton L.J. observed that in business matters there was a presumption that an agreement was intended to create legal relations although this presumption could be rebutted if the intention so to rebut was expressed with sufficient clarity. I quote from Paget at page 614:

"In determining whether a letter of comfort is acceptable in circumstances where it might otherwise have required a guarantee, a bank must understand the nature and extent of the commitment which is being

given. Whilst it might be thought that considerations which generally wish give rise to the use of a comfort letter rather than a guarantee are such that the giver would necessarily wish to ensure that the comfort letter did not in itself constitute a legally binding commitment, it appears that the courts will in fact treat such letters as being capable of constituting binding obligations unless the opposite intention is clearly expressed. (Emphasis supplied).

In Chemco Leasing Spa vs Rediffusion pic [1987] 1 FTL R 201, CA Staughton J. held that a parent company was liable as a guarantor of the liabilities of its subsidiary company on the basis of a paragraph in a letter of comfort in the following terms:

"We assure you that we are not contemplating the disposal of our interests in [subsidiary company] and undertake to give Chemco prior notification should we dispose of our interest during the life of the leases. If we dispose of our interest we undertake to take over the remaining liabilities of the lease. If we dispose of our remaining liabilities to Chemco of [subsidiary company] should the new shareholders be unacceptable to Chemco."

The issue that arises for determination in this appeal, in my view, is whether the two letters in question constitute a guarantee or assurance by the appellant bank to Sanghanis to the effect that the appellant bank would see to it that the Sanghanis were paid the contract sum as per architect's certificates. Before I say more, I must refer to the evidence before the superior court which evidence the appellant bank did not rebut.

The two letters in question came into existence as a result of Mr. Sanghani's insistence that a guarantee for payment be provided; that they signed the contract on Mr. Nyammo's aforesaid assurance; that Sanghanis would not commence work until they had the guarantee; that Sanghanis were told of the letters having been received by Barclays Bank; that Sanghanis took possession of the building site after getting the said letters; that all cheques in payment of architects certificates were drawn by Pentax upon the appellant; that the first 33 certificates were honoured; that the last two certificates remained unpaid; that the appellant had given overdraft facilities to Pentax to the tune of Shs.20,000,000/=; that the directors of Pentax had guaranteed repayment [of the loan] to the appellant and that the statement of account of Pentax with the appellant bank was with them. This evidence by Mr. Sanghani remained totally uncontroverted by any evidence from Mr. Gutu or any other officer of the appellant bank. This, in my view, a presumption that these letters were meant to create contractual relationship between the appellant bank and Sanghanis. These are not merely letters of comfort. In my view the presumption has not been rebutted either by evidence or by construction of the contents of the letters. These letters said:

1. Pentax had suitable banking facilities with the appellant bank for the construction work.

2. Pentax were supposedly good for payments which will fall due under the construction contact.

3. Payments were to be made direct by the appellant bank to Sanghanis. The word 'direct' in my view can only mean that the liability for payments would be that of the appellant bank.

4. The payments to be made were to the extent of the overdraft facilities which Pentax had from the appellant bank which facilities the bank confirms are suitable for the contract for construction.

In my view these letters are not a common form references from a bank relating to a customer. The letters said quite categorically that the payments would be made by the appellant bank, on architect's certificates, out of the facilities granted by the appellant bank to Pentax which facilities are suitable.

Although the learned judge in the superior court did not analyse the letters he, in my view, correctly concluded that the letters he, in my view, correctly concluded that the4 letters constituted a guarantee. As was his custom, Shields, J. did not write a comprehensive judgement. However he came he to, nevertheless, a correct decision.

Mr . Oraro referred to and relied on the case of Heilburt, Symons & Co. V Buckleton (1913) AC 30. In

that case the House if Lords overruling the Court of Appeal in England held that the question whether an affirmation made by the vendor at the time of sale constitutes a warranty depends on the vendor at the time of sale constitutes a warranty depends on the intention of the parties to be deduced from the whole of evidence, and the circumstances that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention, is not conclusive of the question. Keeping this case in mind the only conclusion I can draw in the instant case is that the intention of the parties as seen by mw was to create a contractual relationship. There was no mere talk. A concrete undertaking had come into effect.

But I must deal with other issues raised by Mr. Oraro. It was urged that the appellant bank's liability, if any,, ceased upon the end of the contract period. This point was not taken by Mr. K'Owade in the superior court. However , the extension of the period of the contract , in my view, did not effect the contractual obligations of the appellant bank under the letters in question. The payments which were made were effected through the appellant bank. These were 33 payments were not made. This point was not taken in the defence filed by the appellant bank.

Mr. Oraro also took issue to the effect that the letters in question as addressed by the appellant bank to the bankers of Sanghanis did not constitute an agreement between the appellant and Sanghanis. With respect, the letters were meant for consumption by Sanghanis and not by Barclays Bank. I fail to see how Sanghanis could be strangers to the letters. Mr. Oraro relied upon the case of Duncan, Fox & Co, V North and South Wales Bank (1880) 6 A C 1 at p. 11 for this proposition. In the modern world of business, letters to bankers of the creditors with emphasis on he fact as to who the letters is meant for the letters say your M/s Sanghani Builders) cannot be simply meant to be written in vacuum. As I have pointed out these letters were meant to create contractual relationships and which presumption has not been rebutted. I note of course that Mr. K'Owade finally informed the learned judge that he was not calling any witnesses. This is the problem Mr. Oraro has not been able to surmount. Why the bank did not offer evidence is not for me to speculate upon.

Another point Mr. Oraro argued was that in any event interest could not have been ordered payable from the date the certificates of the architect were due to be paid. In support of this argument Mr. Oraro referred to the contract itself which does not provide for payment of interest after dates the certificates are not paid on due dates. Whilst the building contract does not so provide, that contract provides that if the contractor is not paid he may stop work and proceed to arbitration. That is correct but ought such interest not be awarded? Certainly the arbitrator could order payment of interest if the matter went before him, as between the contractor and the owner.

This issue is settled, in my view, simply by reference to section 26 of the Civil Procedure Act which empowers the superior court to award interest from such date it thinks proper, whether before or after the date of filling of suit . I do not think that the learned judge could be criticized for awarding such interest.

I would dismiss the appeal with costs and direct that the sum of Shs.6,014,77/= received by Sanghanis at the end of May, 1992 be taken as payment to Sanghanis in reduction of the appellant bank liability to Sanghanis. Sanghanis must pay to the appellant bank the said sum of Shs. 6,014,777/= as Sanghanis have been paid in full the decretal sum by the appellant bank. To the sum of Shs 6,014,777/= will be added interest @ 12% per annum from 1st June, 1992 until date of payment to the appellant bank by Sanghanis.

Dated and delivered at Nairobi this 15th day of November, 1996.

A.B. SHAH

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JUDGE OF APPEAL