



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE NO 639 OF 1988

BANK OF CREDIT & COMMERCE INTERNATIONAL LTD..... APPLICANT

VERSUS

LUKA BAUDI GALGALO..... RESPONDENT

RULING

This is an application by the plaintiff in the suit that summary judgment be entered against the defendant as prayed in the plaint. The application is supported by the affidavit of Abdulhussein Omar, an officer in the plaintiff bank.

The plaintiff's claim of shs 191,134/95 is pleaded as being the amount due and owing on a foot of a letter of guarantee dated 7th December 1983 under which the defendant guaranteed payment of all sums due by Zoom Worldwide Ltd.

Mr Omar in para 4 of the affidavit shows that the claim is made of two parts – shs 100,000/- which is the principal sum specified in the letter of guarantee and the balance being interest on the sum of shs 100,000/- from November 1983 as per schedule annexed.

In para 3 of the statement of defence, the defendant pleads that under the express terms of the guarantee the total amount recoverable from the defendant is shs 100,000/-.

The application is opposed on the ground that the defence discloses a triable issue.

The respondent does not deny liability in respect of the principal sum of shs 100,000/-. The respondent does not also deny that interest of shs 91,134/95 has accrued on the principal sum of shs 100,000/-. What the respondent states is that under the terms of the guarantee the liability of the respondent was limited to the principal sum of shs 100,000/- and not to accruing interest.

Indeed Mr Inamdar for the respondent concedes that if the applicant's application succeeds, then judgment should be entered for the plaintiff for the total of shs 191,134/95 claimed in the plaint plus interest at bank rates.

The only issue which arises in this application is the meaning of the letter of guarantee. The relevant paragraph of the letter of guarantee states:-

“In consideration of your making or continuing advances or otherwise giving or continuing credit or accommodation to Zoom Worldwide Limited (hereinafter called the principal) I guarantee to you due

payment, within two days after demand, of all monies and liabilities which shall at any time be due to you from the principal, whether certain or contingent now or hereafter owing to or incurred by you from or by you, together with interest, charges, costs etc provided that the total amount recoverable from me under this guarantee shall not at any time exceed the principal sum of shs 100,000/- (shillings one hundred thousand only) exclusive of interest and charges”.

On the construction of guarantees, para 25 page 761 of *Encyclopaedia of Forms and Precedents*, 4th Edn, Vol 9 states:-

“The ordinary rules of construction applicable to all contracts also govern the contracts of guarantee. The whole agreement must, in the usual way, be considered, and the natural meaning given to the words used unless such meaning involves obvious absurdity. The surrounding circumstances must also be taken into consideration, where the guarantee requires explanation. The surety will not be charged beyond the precise terms of his engagement, he being regarded in the light of a “favoured debtor”. Where those terms admit of doubt, and all other rules of exposition fail, the principle “*verba fortius occipiuntur contra preferentem*” applies.”

If there is ambiguity, on the principle of “*contra preferentem*”, the ambiguity must be resolved in favour of the surety. According to Mr Kasman for the applicant, the last words in the letter of guarantee “exclusive of interest and charges” means that the amount due is shs 100,000/- plus interest and charges on the sum of shs 100,000/-.

Further, he argued that the words “all monies and liabilities ...” refer to the principal sum of shs 100,000/- and the words “together with interest, charges and costs” refer to interest and costs.

According to Mr Inamdar, the words “exclusive of interests and charges means without interest and charges.

He contrasted these words with the words “together with interest, charges, costs, etc” and stated that as different words have been used in the guarantee, the implication is that the different terminology should have different meaning and that if the intention was that the shs 100,000/- is together with interest and costs, then words like together with , plus etc would have been used.

The words “together with” according to Longman Dictionary of contemporary English means, as well as, along with, in addition to, in the same dictionary the words “exclusive of” means not taking into account, without. The relevant clause of the guarantee which has caused this dispute can be divided into two parts. The main part talks of the sum the defendant guaranteed to pay and the second part is the proviso – the limit of liability.

The words “whether certain or contingent now or hereafter owing to or incurred by you,” are separated by a comma from the words “of all moneys and liabilities which shall at any time be due to you from the principal” and from the words “together with interest charges costs etc”. The implication is that the words “whether certain or contingent now or hereafter owing to or incurred by you” are in fact in parenthesis and refer to and serve as clarification of “of all monies and liabilities”. Those words are not therefore anchored to the words “together with interest, charges, costs, etc”. If the parenthesis is removed, then the words “of all monies and liabilities which shall at any time be due to you from the principal” are anchored to the words “together with interest, charges, costs, etc”. The sentence would then read “of all monies and liabilities which shall at any time be due to you from the principal together with (in addition to) interest charges, costs, etc.” That shows that the amount the defendant guaranteed to pay was all monies and liabilities in addition to interest charges, costs etc.

Turning now to the proviso, it says that the total sum recoverable shall not in any time exceed the principal sum of shs 100,000/- exclusive of interest and charges. The letter of guarantee is printed except the words shs 100,000/- (one hundred thousand only) which are handwritten. There is therefore no comma between the words “principal sum” and “exclusive of interest and charges”.

So the total sum in the proviso is the principal sum of shs 100,000/- exclusive of interest and charges. If we substitute “not taking into account” for “exclusive of” the total sum in the proviso is the principal sum of shs 100,000/- not taking into account interest and charges. But in the first paragraph of the letter of guarantee the defendant guaranteed to pay all moneys and liabilities together with interest charges, costs etc. If the whole guarantee is given the meaning suggested by Mr Inamdar, the meaning would be illogical. Further, if the total liability was only in regard to the principal sum of shs 100,000/- then there was no need to add the words “exclusive of interest and charges”.

As the guarantee covered monies and liabilities to be incurred by the principal later, the interest and charges could not be ascertained at the time of execution. It is only the principal sum of shs 100,000/- which could have been ascertained. The words “exclusive of interest and charges” may be inaccurate or inappropriate but that does not necessarily mean that they are ambiguous – that is, they have double meaning in the letter of guarantee.

Even if the words are ambiguous such ambiguity would only be patent –that is manifest without extrinsic evidence and section 99 of the Evidence Act prohibits introduction of extrinsic evidence to show their meaning. Further, section 100 of the Evidence Act shows that when the language used in a document is crystal clear and it applies accurately to the existing facts, no extrinsic evidence can be allowed to show that the parties intended it to mean something else.

In *Concord Insurance Co Ltd v Lister Gideon Kasria and Others* – Civil Appeal No 124 of 1984, (Msa) the Court of Appeal held as much in a similar application. So, even if the suit goes for trial, no extrinsic evidence will be allowed to explain the alleged ambiguity.

Having considered the letter of guarantee as a whole and applying the principles of construction referred to earlier, I do not see any ambiguity in the letter of guarantee. I am satisfied that the plain meaning of the guarantee is that the defendant guaranteed to pay the shs 100,000/- together with interest and charges and that was the intention of the parties. Any other meaning would be strained and would not give any sound commercial effect to the letter of guarantee.

I allow the application and enter judgment for the plaintiff against the defendant for shs 191,134/95 with interest at 15% and costs.

Dated and Delivered at Mombasa this 31st Day of August, 1989

E.M. GITHINJI

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JUDGE