

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 159 OF 2004

**SOUTHERN CREDIT BANKING
CORPORATION LIMITED.....
PLAINTIFF**

VERSUS

**TANUJ GULABCHAND RAJA.....1ST
DEFENDANT**

**CHARLES KYALO MUTHUMA.....2ND
DEFENDANT**

**KIRAN CHANDUBHAI PATEL.....3RD
DEFENDANT**

**GILBERT MACHARIA KIBE.....4TH
DEFENDANT**

JUDGMENT

1. The Plaintiff, being the successor of Bullion Bank Limited, commenced this suit by the plaint dated 24th March 2004 against the Defendants herein jointly and severally for:
 - i. Kshs. 215, 607,678. 96*
 - ii. Interest at the rate of 21% p.a. from 1st February 2004 until payment in full.*
 - iii. Costs of this suit and interest*
 - iv. Any other relief or remedy as this Honourable court may deem just and fit to grant.*

2. The Plaintiff contends that by a court order dated 25th October 2001, it acquired all the rights, property, and powers of Bullion Bank Limited upon merger, and the name was subsequently changed to Southern Credit Banking Corporation Limited. At all material times, the Defendants were directors of Eagle Aviation Limited (“the principal debtor”), a company engaged in the aviation business.
3. In or about April 1996, at the request of the Defendants and the principal debtor, the Plaintiff advanced to the principal debtor an overdraft facility of Kshs. 45,000,000.00 secured by a debenture dated 24th April 1996. The 2nd, 3rd, and 4th Defendants executed personal guarantees securing the said facility and undertook to indemnify the Plaintiff against any loss arising from default.
4. The Plaintiff avers that on or about 10th September 1998, while an amount of Kshs. 82,793,505.70 remained outstanding. The 1st Defendant, then Executive Director of the principal debtor, caused the release of the said debenture fraudulently and in breach of duty, thereby depriving the Plaintiff of its only security. The Plaintiff contends that the discharge was executed without its authority and with the intent to benefit the principal debtor to its detriment. The principal debtor was thereafter placed under receivership on 3rd October 2000, and despite demand, the 2nd, 3rd, and 4th Defendants failed to honor their guarantees.

5. The 1st Defendant, by his amended defence dated 28th June 2017, denied the Plaintiff's claim, asserting that the overdraft facility was advanced at the request of the principal debtor and not the Defendants personally. He denied any fraudulent conduct and maintained that the release of the debenture was done by the Plaintiff's own officers. He further contended that the suit is discriminatory as not all directors of the principal debtor were joined, and that the claimed amount includes illegal and punitive interest.
6. The 2nd and 4th Defendants, by their respective defences dated 23rd July and 5th August 2004, denied liability and averred that they had ceased to be directors of the principal debtor on 18th February 1997 upon transfer of their shares to the 1st Defendant. They relied on a Memorandum of Understanding allegedly executed on the same date, which, according to them, extinguished their liabilities. They further argued that the guarantee was void *ab initio* for lack of execution by the Plaintiff and urged dismissal of the suit.
7. The 3rd Defendant admits signing the alleged guarantee but maintains that it is invalid, unenforceable, and has ceased to have legal effect. He contends that the guarantee was rendered null and void by the fraud of the 1st Defendant, in which he had no knowledge or participation, and for which the Plaintiff, being related to the 1st Defendant, bears responsibility. He further states that his guarantee was

executed on the express understanding that the borrowing was secured by a debenture dated 24th April 1996. The release or variation of this security without his consent materially altered the terms of the agreement and discharged him from liability.

8. The 3rd Defendant adds that he could not have bound himself to a contract tainted by fraud and that any valid guarantee was subsequently discharged by a Memorandum of Agreement executed between the guarantors, the principal debtor, and the bank.
9. He also argues that the alleged guarantee was void *ab initio* for uncertainty, as it purported to bind the guarantors simultaneously as primary obligors, sureties, and indemnifiers. The Plaintiff, he claims, never demanded payment from the principal debtor nor called up the guarantee, making the suit premature. Further, the release and re-pledging of the debenture and other material variations in the contract discharged him from all obligations.
10. The 3rd Defendant reiterates that the 1st Defendant's fraudulent or negligent acts, as acknowledged by the Plaintiff, legally released him from the guarantee. He also asserts that the amount claimed by the Plaintiff, Kshs. 215,607,678.96, exceeds the guaranteed limit of Kshs. 45,000,000.00 and is therefore not recoverable from him. Finally, he avers that the bankruptcy of the principal debtor

annulled any debt due, thereby extinguishing his liability under the alleged guarantee.

The Evidence

11. The Plaintiff and the Defendants each called one witness whose testimony largely mirrored the averments set out in their respective pleadings. The witnesses were heard before Honourable Lady Justice M.A. Odero.

Analysis and determination

12. From the pleadings and evidence, the following issues arise:

- i. Whether the guarantees executed by the 2nd, 3rd, and 4th Defendants are valid and enforceable;*
- ii. Whether the discharge of the debenture released the guarantors from liability;*
- iii. Whether the sale of shares and resignation of the 2nd and 4th Defendants discharged them from the guarantees; and*
- iv. Whether the Plaintiff has proved its claim against the Defendants on a balance of probabilities.*

Whether the guarantees executed by the 2nd, 3rd, and 4th Defendants are valid and enforceable

13. It is not in dispute that the 2nd, 3rd, and 4th Defendants executed guarantees securing the facility advanced to Eagle Aviation Limited. Under Section 3(1) of the Law of Contract Act, a contract of guarantee must be in writing and signed by the party to be charged. The Plaintiff produced duly executed guarantees satisfying this requirement.

14. **The Law of Guarantees** - by Geraldine Andrews & Richard Millet 2nd Edition, at page 156:

***“A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point.*”**

15. The Defendants contended that the guarantees were void *ab initio*. However, the documents produced in evidence show that the Defendants executed valid deeds of guarantee, each expressly limiting liability to Kshs. 45,000,000.00 The law is settled that a guarantee is a separate and distinct contract from that of the principal debtor. As held in **Kenya Commercial Bank Ltd v Osebe [1982] KLR 296**, a guarantee creates an independent obligation which becomes enforceable upon the principal debtor’s default. The Defendants’ argument that they were not personally liable cannot stand once they executed written guarantees clearly binding themselves jointly and severally to the Plaintiff.

Whether the discharge of the debenture released the guarantors from liability

16. The 3rd Defendant contends that the release of the debenture discharged the guarantors. In the present case, evidence shows that the debenture was released through the acts of the 1st Defendant, a director of the principal debtor. The Plaintiff did not authorize the release and indeed suffered loss thereby. A surety cannot rely on a co-director's fraud to escape liability where the creditor was itself a victim of the fraud. As the Court of Appeal held in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, fraud cannot be presumed; it must be strictly proved, and the burden lies on the party alleging it. The Defendants have not discharged that burden.
17. This position finds support in **Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 Others [2004] eKLR**, where the Court held that a guarantee remains binding notwithstanding acts of the debtor unless the creditor expressly releases the surety.
18. On the issue of fraud, the Plaintiff adduced evidence that the 1st Defendant caused the discharge of the debenture fraudulently and in breach of duty. Under Section 108 of the Evidence Act, the burden of proof rests on the party asserting fraud. The Plaintiff discharged this burden through documentary and testimonial evidence. The 1st Defendant's defence that the discharge was authorized by the bank is unsupported and is inconsistent with the admitted loss of security.

19. Consequently, I find that the release of the debenture, whether lawful or fraudulent, did not discharge the guarantors from their obligations

Whether the sale of shares and resignation of the 2nd and 4th Defendants discharged them from the guarantees

20. The 2nd and 4th Defendants argued that they ceased being directors and shareholders on 18th February 1997 and that a Memorandum of Understanding extinguished their liability. Guarantees are independent contracts, and liability thereunder persists until the debt is repaid or the guarantee discharged in accordance with its terms. (See **African Banking Corporation Ltd v Ndirangu & Another [2018] eKLR**).

21. It is settled law that a guarantee is a continuing obligation unless revoked or discharged in accordance with its terms a guarantor's liability is not terminated merely because they cease to be a director or shareholder of the principal debtor. The 2nd and 4th Defendants' argument that they sold their shares and left the company cannot, on its own, extinguish liability under a duly executed guarantee unless the guarantee expressly provides for such release or the creditor consents in writing.

22. The 3rd Defendant argued that the release of the debenture discharged him. A surety is discharged if the creditor and debtor, without the surety's consent, agree to a material variation of the principal contract. However, this

principle does not apply where the variation is caused by fraud or wrongful conduct of the debtor without the creditor's consent.

23. The evidence before this Court shows that the release of the debenture was effected through the fraudulent acts of the 1st Defendant, not with the bank's consent. The guarantors cannot rely on the borrower's fraud to evade liability. A guarantee remains binding notwithstanding acts of the debtor unless the creditor expressly releases the surety or the contract is frustrated by law - (See **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**).

24. On the alleged invalidity of the guarantee, this Court finds that the guarantee documents were clear and unambiguous. They were executed voluntarily and expressly limited to a maximum liability of Kshs. 45,000,000.00. The Plaintiff is therefore entitled to recover the amount within that guaranteed limit, together with applicable interest, as stipulated in the facility agreement.

25. The contention that the Plaintiff never called up the guarantee or demanded payment from the principal debtor is contradicted by the documentary evidence of demand notices produced in court. The 3rd Defendant's claim that the principal debtor's bankruptcy extinguished the debt is also misplaced. Under Section 39(1) of the Insolvency Act, a

creditor's rights against guarantors remain unaffected by the bankruptcy of the principal debtor.

Whether the Plaintiff has proved its claim against the Defendants on a balance of probabilities

26. The Plaintiff produced certified statements of account, the debenture instrument, and guarantee deeds showing that as at 31st January 2004, the sum of Kshs. 215,607,678.96 remained outstanding. The contention that the amount included illegal interest was not supported by any expert or documentary evidence. The Court is guided by **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd** (supra) where it was held that a debtor who freely contracts to pay interest cannot later challenge it as unconscionable absent proof of illegality.
27. The court finds that the Plaintiff has proved on a balance of probabilities that the Defendants executed binding guarantees, that the Plaintiff lawfully advanced the facilities, and that the loss arose from the wrongful acts of the 1st Defendant. The release of the debenture, though fraudulent, does not absolve the guarantors from their obligations under the guarantee deeds.
28. In light of the foregoing, the Court finds and holds that the Defendants are jointly and severally liable to the Plaintiff for the outstanding sum. The Plaintiff has established its claim on a balance of probabilities.
29. Judgment is entered for the Plaintiff against the Defendants jointly and severally for:

- i. The sum of Kshs. 215,607,678.96;***
- ii. Interest on the said sum at 21% per annum from 1st February 2004 until payment in full; and***
- iii. Costs of the suit to the Plaintiff.***

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **6th** day of **November** 2025.

P.M. MULWA
JUDGE

In the presence of:

Mr. (Prof.) Abuya for Plaintiff

Mr. Wanjohi for 1st Defendant

Mr. Kabaiku for 2nd & 4th Defendants

Mr. Taib, SC for 3rd Defendant

Court Assistant: *Carlos*