

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E991 OF 2023

CIM CREDIT (K) LTD T/A ASPIRA.....
.....APPELLANT

VERSUS

BRIAN KIPROTICH RUTTO.....
RESPONDENT

**(Being an appeal from the Ruling and Order of
the smalls claim court at Nairobi (Hon Gillian
Simatwo RM) delivered on 28th August 2023 in
Milimani Small claims Court SCCOMM No. E4591
of 2023)**

ARISING FROM

CIM CREDIT (K) LTD T/A ASPIRA.....
.....PLAINTIFF

VERSUS

BRIAN KIPROTICH RUTTO.....
DEFENDANT

JUDGEMENT

A. Introduction

1. The Appellant did file their statement of claim dated 20th June 2023, where they sued the respondent seeking judgment as against him for the sum of **Kshs 671,770/=** plus interest thereon at the rate of 12% PA from the date the suit was filed until date of settlement of the outstanding amount in full. It was their contention that in November 2022, they had provided a credit facility to Kritken Enterprise Ltd to enable them purchase a Tipping trailer Registration No **ZE 5573 (Chassis No. LTEA14075FL)** for which the respondent as the said companies' director had provided his personal guarantee affirming that he would repay the monthly instalments for and on behalf of the principal debtor- company.
2. In Response, the respondent did file a Preliminary Objection dated 1st August 2023 raising the following grounds of Appeal namely;

- a) That pursuant to the Arbitration clause contained in the credit facility Agreement signed on 15th November 2022, between Kritken Enterprises Limited (hereinafter referred to as the principal debtor) and the claimant herein, this Honourable court does not have jurisdiction to hear this claim.**
- b) That the aforementioned Agreement clearly spells out how a dispute having arisen ought to be resolved.**
- c) That the claim herein offends the provisions of Section 6(1) of the Arbitration Act, 1995 in that; the claimant has instituted a claim against the respondent herein in his capacity as a personal guarantor to the principal debtor herein as a primary measure without having made attempts whatsoever to result to negotiations and subsequent thereto Arbitration, between it and the principal debtor herein, as elucidated in the Arbitration clause contained in the credit facility Agreement signed on 15th November**

2022 and therefore, the same is improperly before this court.

d) That the suit herein is defective and offends the provisions of the company Act having been instituted against the respondent in his personal capacity

e) That accordingly, the claimants claim dated 20th June 2023 is an abuse of court process and consequent thereto, the same ought to be struck out.

3. The trial court did consider the parties submissions to the preliminary objection and upheld the same on the basis that the parties ought to subject themselves to arbitration first as provided for under clause 15 of their agreement.

Being wholly dissatisfied as against the said Ruling/Order the appellant did file this appeal and raised the following grounds of appeal;

a. That the learned Adjudicator erred in fact and in law by failing to consider that the letter of guarantee dated 15th November 2022 made in favour of the Appellant is a distinct and autonomous contract from the credit facility

Agreement between the Appellant and Kritken Enterprise Limited.

b. That the learned Adjudicator erred in fact and in law by holding that the dispute resolution mechanism envisaged in the credit facility agreement dated 15th November 2022 applies to the guarantee dated 15th November 2022.

c. That the learned Adjudicator erred in fact and in law by holding that the court lacked jurisdiction to entertain the dispute before it.

4. The Appellant thus prayed that the said ruling be set aside and be substituted with a finding that the trial court had jurisdiction to determine the said dispute and that they be awarded the cost of this Appeal.

B. ANALYSIS & DETERMINATION

5. The court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. It is trite law, that the appellate court will only interfere with the judgment of the lower court, if the said

decision is founded on wrong legal principles. That was the holding of the Court of Appeal in **Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA** held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

6. The only issue for determination in this appeal is whether the parties contracted to go for Arbitration before either could file their claim before court. It is important to note that Appellant did enter into a credit facility Agreement dated 15th November 2022 with Kritken Enterprise Limited, wherein the Appellant agreed to finance the said company to purchase a ***Tipping Trailer Registration No ZE 5573 (Chassis No LTEA140075FL)*** and as a prerequisite to the said funding the said company was requested to present a guarantee from a guarantor of its choice, who would guarantee the

monthly instalment as specified in the first schedule of the said agreement.

7. Pursuant, thereto, the respondent did provide a guarantee also dated 15th November 2022 where he committed to guarantee payment of **Kshs 1,200,000/=** payable in 24 equal monthly instalments of **KShs 79,000/=** due from December 2022 to November 2024 for and on behalf of Kritken Enterprise Ltd upon request from the Appellant.
8. It is clear from the pleadings filed and supporting documentation that the letter of guarantee issued by the respondent is a distinct contract from the credit facility agreement entered between the Appellant and Kritken Enterprise Limited and did not have an arbitration clause. That being the case, the dispute resolution mechanism envisaged in the credit facility agreement does not apply to the letter of guarantee. Reliance is placed on **Paget's law of banking (14th Edition 2014 at page 892)** where it was stated that;

"The principal which underlies demand gurantee is that each contract is

autonomous. In particular, the obligation of the guarantor is not affected by the disputes under the underlying contract between the beneficiary and the principal. If the beneficiary makes a honest demand, it matters not whether as between himself and the principal he is entitled to payment. The guarantor must honor the demand....

9. The autonomous principle of guarantees was further enunciated in **Kenya Railways Corporation V Development Bank of Kenya & Others (2019) eKlr**, where it was held that;

“ A guarantor's contract is an independent one of his own; he cannot therefore be joined in the same suit with his principal. This is because different legal instruments with different legal obligations govern both the guarantee and principal debtor”

10. In the said **Kenya Railways case(Supra)** reliance was also placed in the case of **Ebony Development**

Company Ltd Vs Standard Chartered Bank Ltd (2008) eklr , where it was held that ;

“ The security of the charge was a guarantee. The obligation of a guarantor is clear. It becomes liable upon default by the principal debtor. The charge concerning this matter is the second charge updating the indebtedness of the borrower. It is not the guarantor to see to it that the borrower complies with his contractual obligations but to pay on demand the guarantees sum.....”

C. DISPOSITION

11. The upshot is that this Appeal has merit. The ruling/Order of Hon Gillian Simatwo, Resident Magistrate dated 7th July 2023 and delivered in **MILLIMANI SCCOMM E4591 OF 2023** is hereby set-aside and the respondents preliminary objection dated 1st August 2023 is hereby dismissed with costs to the Appellant.
12. The Appellant will have costs of this Appeal which is assessed at **Kshs 120,000/=** all inclusive.

13. It is so ordered.

**Judgement written, dated and signed at Marsabit
this 1ST day of DECEMBER 2025.**

FRANCIS RAYOLA OLEL

JUDGE

**Delivered on the virtual platform, Teams this 1st
day of DECEMBER , 2025.**

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

