**Paramount Bank Ltd v First National Bank Ltd & 2 others (Civil Appeal (Application) 468 of 2018) [2026] KECA 202 (KLR) (6 February 2026) (Ruling)**

Neutral citation: [2026] KECA 202 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL (APPLICATION) 468 OF 2018**

**MS ASIKE-MAKHANDIA, K M'INOTI & M NGUGI, JJA**

**FEBRUARY 6, 2026**

**BETWEEN**

**PARAMOUNT BANK LTD ..... APPLICANT**

**AND**

**FIRST NATIONAL BANK LTD ..... 1ST RESPONDENT**

**D. G. BHATTESSA ..... 2ND RESPONDENT**

**M. R. KHAN ..... 3RD RESPONDENT**

***(Application for certificate to appeal to the Supreme Court from the judgment of the Court of Appeal at Nairobi (Okwengu, Mativo & Ngenye, JJ.A.) dated 15th December 2023 in CA No. 468 of 2018)***

**RULING**

1. The Motion on Notice before the Court is taken out by the applicant, Paramount Bank Ltd, and seeks a certificate that the its intended appeal to the Supreme Court raises matters of general public importance within the meaning of Article 163(4) of *the Constitution*. On 15th December 2023, this Court (Okwengu, Mativo & Ngenye, JJ.A) dismissed the applicant's appeal and upheld the decision of the High Court (Ochieng, J., as he then was) which ordered the applicant to honour two guarantees to the 1st respondent, First National Bank Ltd. The matter of general public importance involved in the intended appeal is the alleged confusion caused by the said judgment as regards the law on guarantees.

2. Before we consider the application, it is appropriate to briefly sketch its background. On 5th January 1996 and 3rd September 1996, the applicant gave two guarantees to the 1st respondent as security for banking facilities and other accommodation extended by the 1st respondent to a company known as Gnanjivan Wire Galvanising Mills Ltd (the principal borrower). The said guarantees were for Kshs.

10,000,000.00 each and were executed by the 2nd respondent, D. G. Bhattessa and the 3rd respondent, M. R. Khan in their capacities as directors of the 1st respondent.

At the material time, the 2nd respondent was the chairman and a director of the applicant, as well as a director and a shareholder of the principal borrower.

3. The principal borrower defaulted and on 7th March 1997, the 1st respondent issued upon the applicant a notice of default calling upon the applicant, in its capacity as guarantor, to pay to the 1st respondent the sum of Kshs 16,814,592.55 said to be due and owing from the principal borrower. When the applicant failed to honour the guarantee, the 1st respondent filed a suit in the High Court against the applicant and the 2nd and 3rd respondents for recovery of the said sum of Kshs. 16,814,592.55 and interest at the rate of 36% per annum with effect from the date of the notice of default, until payment in full.

4. The applicant resisted the suit, pleading that at the material time the 2nd and 3rd respondents were neither its officers, nor authorised signatories and therefore could not bind it in the guarantees. The applicant further pleaded that in executing the guarantees, the 2nd and 3rd respondents were guilty of fraudulent misrepresentation. It was also contended that the guarantees were not enforceable because the 1st respondent had failed in its duty to obtain from the applicant the list of its authorised signatories and that the guarantees in respect of a bills discounting facility were based on past consideration.

5. It was the applicant's further contention that if, which it denied, the guarantees were valid, the same were discharged because of material and substantial variation of the contract between the principal borrower and the 1st respondent without the knowledge of the guarantor.

6. On their part, the 2nd and 3rd respondents denied the claim against them, but conceded having given the guarantees to the 1st respondent on behalf of the applicant and in their capacities as chairperson/ directors. They contended that in the circumstances, they were not personally liable on the guarantees.

7. At trial, the applicant and the 1st respondent called one witness each whilst the 2nd and 3rd respondents did not call any witnesses. After considering the matter, the trial court, by a judgment dated 3rd September 2018, held that the guarantees were clear on the parties thereto and the sum guaranteed; that at the time the 2nd and 3rd respondents executed the guarantees they were authorised officers of the applicant; that the guarantees were not limited to bills discounting facility but extended to "any other accommodation"; that the terms of the guarantees did not require provision of a statement of accounts to the applicant; and that the applicant was under obligation to pay the sum demanded by the 1st respondent immediately upon receipt of first demand letter.

8. As regards the applicant's contention that the guarantees were discharged by variation, the learned judge found that the variation alleged by the applicant was the conversion of the bills discounting facility into a loan account without regard to the guarantor and that while such variation was substantial and could result in discharge by variation, in this case the guarantees were not limited to the bills discounting facility, and therefore, there was no discharge by variation. In the circumstances the learned judge found that the conversion of the outstanding balance into a loan facility fell squarely within the contemplation of the applicant and the 1st respondent and did not discharge the applicant's obligations under the guarantees.

9. Ultimately the learned judge ordered the applicant to pay to the 1st respondent Kshs. 14, 290, 917.55 with interest at courts rates from the date of judgment until payment in full, having found that the 1st respondent's claim for interest at 36% per annum had no legal basis. The 1st respondent's case against the 2nd and 3rd respondents was dismissed and the applicant was ordered to pay costs of the suit.

10. The applicant was aggrieved and lodged an appeal in this Court founded on 14 grounds of appeal. The 1st respondent lodged a cross-appeal challenging the trial court's refusal to award it interest at 36% per annum.

11. This Court framed three issues for determination, namely, whether the 2nd and 3rd respondents had authority to execute the guarantees; whether the applicant was liable under the guarantees; and whether the High Court erred by entering judgment against the applicant and absolving the 2nd and 3rd respondents from liability.

12. By the judgment that the applicant intends to appeal to the Supreme Court, this Court found that the applicant did not adduce reliable evidence that the 2nd and 3rd respondents were not its authorised signatories; that the guarantees were independent contracts that were not dependent on the validity of the primary contract; that the applicant could not object to payment of the moneys under the guarantees because the guarantees were unconditional and irrevocable; that in the absence of fraud the court cannot interfere with invocation and enforcement of a guarantee; that the variation was contemplated by the guarantees; and that the 1st respondent did not prove its claim to interest at 36% per annum. Ultimately, the Court dismissed both the appeal and cross-appeal and directed each party to bear its own costs.

13. In support of its application for certification to gain a foothold to the Supreme Court, the applicant relied on two sets of written submissions dated 5th February 2024 and 26th April 2024. It submitted that the intended appeal raises matters of general public importance because the judgment of this Court has occasioned a state of uncertainty in the law. Although the applicant identified five issues which it considers to have been muddied by the said judgment as set out in the motion, the issue of public importance that the applicant wishes to agitate in the Supreme Court is whether the judgment of this Court has created uncertainty in the law as regards the doctrine of discharge by variation.

14. Mr. Ngatia, SC, the applicant's learned counsel, submitted that the banking facilities which were the subject of the guarantees were varied substantially without the knowledge, notice or consent of the applicant. Counsel identified the variations to include the taking over by Nalin Nail Works of the debt due from the principal borrower, the restructuring of the bills discounting facilities into a loan facility, and the introduction of a 3rd company known as Skyline Hardware & Glass Ltd., which was required to pay a portion of the loan. It was contended that the High Court found as a fact that the outstanding balance was converted into a loan facility and that, in itself, amounted to a clear and substantial variation. Further, that the banking facilities that were covered by the guarantee were those "as present" on the dates of the guarantees and did not cover future loans or debts. Counsel argued that the judgment of this court was contradictory to the decisions of this Court in Co-operative Bank of Kenya v. Washington Otieno Ogindo [2012] eKLR and David Harris v.

    Middle East Bank Kenya Ltd & 3 Others [2019] eKLR.

15. It was the applicant's further submission that the Court erred by ordering it to pay the guarantees whilst the principal borrower had already paid the 1st respondent. The decision of the Court of Appeal of Nigeria in F.B. N PLC v. Songonuga [2007] 3 NWLR 270 was cited in support of the contention that a guarantee is discharged where the obligation under the guarantee is satisfied.

16. For the above reasons, the applicant urged the Court to issue a certificate to enable it proceed to the Supreme Court so that the apex Court may resolve the uncertainty engendered by the judgment of this Court.

17. The 1st respondent, represented by Mr. Odour, learned counsel, opposed the application on the basis of written submissions dated 31st January 2004. Counsel contended that the intended appeal did not raise any matter of general public importance, because as pleaded, the only issue in dispute was enforcement of guarantees against the applicant and that the matter turned on interpretation of the terms of the specific guarantees in issue. In the 1st respondent's view, the intended appeal therefore did not raise any issue transcending the litigation-interest of the parties and bearing on upon the general public interest.

18. As regards discharge by variation, the 1st respondent submitted that this Court and the High Court made concurrent findings that the guarantees were not discharged by variation and that the applicant, though claiming the issue involves a matter of general public importance, was merely dissatisfied by the concurrent findings and was only seeking an opportunity for a second appeal. On the authority of Sanitam Services (EA) Ltd v. Nyaga & Another [2023] KESC 81 (KLR), it was submitted that determination of contested facts between the parties cannot form the basis of a certificate to appeal to the Supreme Court.

19. The 1st respondent further submitted that the law on enforcement and discharge of guarantees was clear and that the judgment of this Court neither departed from precedent, nor introduced any confusion or inconstancies. For the above reasons the 1st respondent urged us to decline to issue the certificate.

20. The 2nd and 3rd respondent neither filed submissions nor appeared for the hearing, though duly served.

21. We have carefully considered the application, the submissions and the authorities cited by the parties. Both the applicant and the 1st respondent relied on the decision of the Supreme Court in Phillipus Steyn v. Giovanni Gnecchi-Ruscone [2013] eKLR which comprehensively addressed the factors to be taken into account in determining whether or not to certify a matter for appeal to the Supreme Court. Among the factors to be taken into account are that the issues intended to be canvassed in the Supreme Court transcend the circumstances of the particular case and have a significant bearing on the public interest; that the point or points of law involved is/are substantial and their determination will have a significant bearing on the public interest; that mere apprehension of a miscarriage of justice is not sufficient reason for certification; and that determination of contested facts between the parties is equally not a sufficient basis for certification.

22. In addition, the Supreme Court held in Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others [2012] eKLR that only cardinal issues of law or of jurisprudential moment will deserve its further input, whilst in Malcolm Bell v. Daniel Torotich Arap Moi & Another [2013] eKLR the same Court emphasised that its jurisdiction is not to be invoked merely for the purpose of rectifying errors with regard to matters of settled law.

23. Turning to this application, we are satisfied that the confusion alleged by the applicant to have been occasioned to the law of guarantees by the judgment of this Court is more apparent than real. Neither the High Court, nor this Court held that substantial variation without the knowledge of the guarantor does not discharge the guarantee. On the contrary, both courts reiterated the doctrine of discharge by variation, but found that in the case at hand, it was not applicable because the guarantees covered not only the bills discounting facility, but also "any other accommodation." In other words, the variations in question were within the contemplation of the parties and were therefore covered by the guarantees and could not form the basis for discharging the guarantees.

24. It is apt to quote the two courts in this regard. The High Court held as follows:

> " The transfer of the debit balance constituted a variance of the original banking facility (or bills discounting), to one of a loan. The said variation was definitely substantial. Therefore if the guarantee instrument had been specially limited to the original facility which the plaintiff had accorded to the principal borrower, I would have had no hesitation in finding that the variation which was done without the consent or knowledge of of the 1st defendant (the applicant) constituted a discharge of the obligations which the said defendant owed pursuant to the guarantees. But as noted earlier herein, the guarantees were in respect of bills discounting facility or any other accommodation. In my understanding, the conversion of the outstanding balance into a loan facility fell squarely within the contemplation of the plaintiff (the 1st respondent) and the guarantor. Therefore the variation in this instance did not discharge the 1st defendant from its obligations under the guarantees." (Emphasis added).

25. On its part, this Court held as follows as regards discharge by variation:

> "We now address the issue whether there was variation of the terms of the guarantees, which discharged the appellant's liability. It is common ground that the outstanding balance was converted into a loan facility vide the letter of offer dated 16th July 1997, resulting in the loan agreement dated 28th July 1997. The appellant (the applicant) maintains that they did not have notice and they were not involved in the restructuring of the bills discounting facility to the said loan facility per the loan agreement dated 28th July 1997. Consequently, the conversion of the outstanding balance into a loan was a clear substantial variation of the banking facility in respect of which the impugned guarantees were issued as appreciated by the learned trial court. According to the appellant, the learned judge erred in concluding that the guarantees were in respect of bill discounting facilities or any other accommodation. We have thoroughly studied the impugned guarantees. We are in consonance with the trial judge's findings that the variation was contemplated in the two guarantees which are both worded in identical terms as follows: "...bills discounting facilities or any other accommodation." The wording of the guarantee instruments was not limited to bills discounting facilities, but it extended to"any other accommodation." Consequently, we find that the conversion of the outstanding balance into a loan facility fell in the category of "any other accommodation" and, as a result, the efforts by the appellant to have its obligation under the impugned guarantees discharged is unmerited." (Emphasis added).

26. In our view, the above judgments cannot be read, even by any stretch of imagination, to say that variation without reference to a guarantor does not discharge the guarantee. The two courts did not depart from the doctrine of discharge by variation., They only found, on the specific facts of the case before them, that there was no uncontemplated variation and therefore the question of discharge by variation could not arise. To say that those holdings have muddied the law on discharge by variation is, to say the least, an unusual reading of the judgments.

27. The applicant also contends that the judgment of this Court has comfounded the law on guarantees by holding that a guarantee is no discharged even after the principal borrower has discharged his obligation under the guarantee. The applicant bases this fundamental and surprising submission on alleged admission by the 1st respondent's witness, Narayan Murthy Sabean, that according to a statement produced in evidence, the principal debtor did not owe the 1st respondent any money. Even a cursory reading of the judgment of this Court will show that there is no substance in the applicant's

submission. How the nil balance that the witness was referring to arose and how it was explained away was addressed squarely by this Court as follows:

> "The appellant claimed that the debt was settled because the account had a nil balance. However, on record is DW1's testimony that the nil balance was because the debit balance of Kshs 14,738,436.95 was transferred to the loan account. We find no reason to disbelieve this explanation."

28. We perceive absolutely no departure from the principle that discharge by the principal borrower of his obligation discharges the guarantee. We also do not see how the findings of this Court, summarised in paragraph 11 above, can be said to be departures from the well established principles on the law of guarantees. If anything, they are a crisp restatement of those principles.

29. For all the foregoing reasons, we are satisfied that the applicant has not demonstrated that the intended appeal to the Supreme Court raises any matters of general public importance within the meaning of the Phillipus Steyn v. Giovanni Gnecchi-Ruscone decision. The alleged confusion occasioned by the judgment of this Court to the law on discharge of guarantees by variation does not exist and the applicant's contentions are based on selective, and we dare say, even mischievous reading of the judgment.

30. We find no merit in this application and dismiss the same with costs to the 1st respondent. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2026.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**K. M'INOTI**

**.....**

**JUDGE OF APPEAL MUMBI NGUGI**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**