



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, KARANJA & KANTAI, JJ.A.

CIVIL APPEAL NO. 330 OF 2012

BETWEEN

GURBUX SINGH BHOGAL.....APPELLANT

AND

FINA BANK LIMITED.....1ST RESPONDENT

SAMCON LIMITED.....2ND RESPONDENT

NARWAR SINGH BHOGAL.....3RD RESPONDENT

PARAMJIT SINGH BHOGAL.....4TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Kimaru, J) dated 27th March 2012

in

HCCC NO. 341 OF 2006)

JUDGMENT OF THE COURT

Fina Bank Limited, (1st respondent), (hereinafter referred to as “**The Bank**”) was a limited liability company carrying out banking business under the **Banking Act (Cap 488 Law of Kenya)**.

Gurbux Singh Bhogal (appellant); **Samcon Limited** (2nd respondent); **Narwar Singh Bhogal** (3rd respondent) and **Paramjit Singh Bhogal** (4th respondent) used to bank with the 1st respondent during the period in question.

It is not disputed that the Bank entered into an arrangement with the 2nd respondent whereby the latter would be availed term loan facilities, or other financial accommodation for an amount that was not to exceed Kshs. 40,000,000/=. From the letter of offer dated 26th January 1998, which was in response to the 2nd respondent’s application dated 12th January 1998, the facility was supposed to be for a period of 48 months.

In consideration of the said term loan facility, the appellant, 3rd and 4th respondents, who were directors of the 2nd respondent, each signed a Guarantee and Indemnity binding themselves “to pay and satisfy the Bank on demand, of all present, future and/or contingent liabilities of the Principal to the Bank, whether on account of moneys, advanced bills of exchange, promissory notes, guarantees/indemnities, interest, commission, banking charges, and whether incurred by the bank in connection therewith and so that as against the Guarantor, interest shall be deemed to continue to accruePROVIDED THAT the total amount recoverable under this Guarantee shall not exceed the Guarantee maximum sum of Ksh 40,000,000”.

Apparently, there was no problem with the first facility and the same was settled, even earlier than within the 48 months provided for in the Guarantee and Indemnity.

It was the appellant’s case that indeed, by February 2002, the facility had been settled in full and the loan account was even in credit of Ksh ten million. The problem arose (and that is the bone of contention) because after the said facility was exhausted and fully settled, there was no discharge of the guarantors.

The 2nd respondent nonetheless went ahead and applied for another facility, this time referred to as a “cheque discounting facility”. There was exchange of several correspondences on that subject which culminated in the 1st respondent’s letter to the 2nd respondent, which we find necessary to reproduce hereunder verbatim.

MAIN OFFICE

8th July 2002

OUR REF: CB/OD/2051/86

Samcon Ltd.,

P. O. Box 273,

NAKURU. Attn: Mr. P. S. Bhogal

Dear Sir,

CHEQUE DISCOUNTING FACILITY LIMIT KSHS.40.0 MILLION

We refer to your letter No. GSB/jwn/2558/2002 dated 4th July 2002 regarding the captioned subject.

We request you to furnish the following to facilitate in taking decision:

- Copies of audited financials as at 31.01.2001 and 31.01.2002 together with latest available management accounts;
- Copies of last annual returns filed with Registrar of Companies along with receipt thereof;

Details of the drawee banks of the various cheques to be discounted; Please complete the attached form for the fresh cheque discounting facility and thereafter return to us for necessary action.

As regard during the last meeting held in our office on 3rd July 2002, attended by your Director we advise as follows;

- Pending putting in place of regular cheque discounting facility, cheques will be discounted on ad hoc basis on merits.

- Interest to be levied at Base + 3% pa.

- Cheques will be discounted with recourse to yourselves.

Yours faithfully,

For. FINA BANK LTD

F.R. KINYANJUI V. M. SHANBHAG

Snr. Relationship Manager Managing Director

In this letter, the Bank requested to be provided with all the documents that it required from the appellant and 2nd and 3rd respondents, to enable it determine whether the facility requested for would be availed to the 2nd respondent. From the tone and purport of the letter, it is evident that it contained fresh requirements. This is the position taken by the appellant. It was clear that this was a totally different transaction, which had no bearing whatsoever on the earlier "Term Loan" which had already been settled. According to this letter "*pending the formalisation of the discounting facility, cheques would be discounted on ad hoc basis on merit*".

The above letter was followed by the letter of offer dated 1st August 2002. Although apparently, there was no formal acceptance of the letter of offer referred to above, and no fresh guarantees were offered, it is not disputed that both sides proceeded with business as usual. Postdated cheques were presented to the Bank by the 2nd respondent and they were discounted as agreed. We can only assume or surmise that each transaction was considered individually, on *ad hoc* basis, and on merit as stated in the letter we have reproduced above.

The Bank did not however, let up on requesting for the documents it deemed necessary to enable it formalise the agreement. A case in point is the letter dated 3rd

September 2002 and the reminder thereafter dated 17th October 2002, whose contents were actually similar.

In these letters, the Bank was requesting for the following documents duly signed and executed:-

- "(i) Offer letter dated 1st August 2002 for Bill discounting facilities for Ksh 40 million.*
- ii. Individual guarantees for Ksh 40 million by each director of the company (names given).*
- iii. Credit agreement for Ksh 40 million to be executed by the company under the common seal.*
- iv. Board Resolution pertaining to the borrowing."*

The above documents were supposed to be forwarded to the Bank by 31st October 2002. This was not done and so the parties continued transacting on *ad hoc* basis as proposed in the letter of 8th July 2002, (reproduced above).

Pursuant to this arrangement the 2nd respondent forwarded several cheques issued in its favour; eight by Ms. Rani Motor Ltd; and two from Foam Mattresses Limited with a request that the same be discounted. Three other cheques issued by Ms. Hardware Trading Stores were also presented for discounting. Unfortunately, before these cheques matured, the 2nd respondent was placed under receivership and the receiver manager stopped payment of some of the cheques to the tune of Ksh 8,700,002/= plus interest all amounting to Ksh 8,879,628/= which was left outstanding on the 2nd respondent's account.

This is the amount that the 1st respondent, who was the plaintiff before the High Court, claimed from the 2nd respondent (the principal borrower); and the four guarantors (appellant, 3rd and 4th respondents). The 1st respondent also claimed interest on that amount at the rate of 13.25% per annum from 1st March 2006 until payment in full; and costs of the suit. Samcon Limited (2nd respondent) filed its defence through Kwengu & Co. Advocates. It denied liability for the amount claimed, basically on the assertion that it had not approved the facility giving rise to the alleged indebtedness.

It was further the 2nd respondent's averment that if it had owed the 1st respondent any money, then such money had been '*lent and paid gratis*'. It also averred that if any bills (or cheques) it had issued had been dishonoured, then no notice of dishonor had been issued by the 1st respondent and so the 1st respondent was not entitled to claim the amount in question. It thus urged the court to dismiss the claim in its totality.

The defence proffered by the other defendants before the High Court was principally the same. They denied that Samcon Limited (2nd respondent) owed the 1st respondent (the Bank) any money. Further that the guarantee plus indemnity signed was in respect of the fixed term loan which had been settled in full. They stated that the cheque discounting facility was a totally different transaction for which they had not signed any guarantee or indemnity. Their contention was that the first guarantee had become spent upon settlement of the loan in full. They had not signed fresh guarantees, even after being called upon to do so, and they could not therefore be called upon to make good any default on the part of the principal borrower (2nd respondent).

After hearing the parties and their witnesses (except for 2nd respondent who did not call any witness), and after considering the submissions filed by the parties through their respective counsel, the learned Judge crystallised the issues for determination into the following;

- “(i) whether the 1st defendant was granted a bill discounting facility by the plaintiff?*
- ii. Whether the said loan was secured by any guarantee given by the 2nd, 3rd and 4th defendants as the directors of the 1st defendant?*
- iii. Whether the guarantees that were earlier given by the 2nd, 3rd and 4th defendants were still valid at the time the plaintiff granted the 1st defendant the bill discounting facility in 2002?”*

On the first issue, the learned Judge answered in the affirmative and pronounced himself as follows:-

“It was clear from the evidence that pursuant to the long standing business relationship between the plaintiff and the first defendant, upon the first defendant making the application to be granted the discounting facility, the plaintiff favourably considered. However, the letter of offer was not signed by the 1st defendant. Neither were the guarantees issued signed by the 1st defendant. In spite of this, the 1st defendant proceeded to endorse postdated cheques issued in its favour by its customers to the plaintiff for purposes of the same being discounted. From the correspondence exchanged between the plaintiff and the 1st defendant, it was evident that both the plaintiff and the 1st defendant proceeded with the transactions as if they were continuing with the previous loan agreement which had in fact been operated as an overdraft facility and not a term loan. From the evidence on record, there is no doubt that the 1st defendant did benefit from the bills discounting facility in regard to the postdated cheque issued by Messrs. Rani Motor Limited, Hardware Trading Stores Limited and Foam Mattresses Limited. These postdated cheques were of various amounts and which together with the interest accrued amounted to Kshs. 8,879,628/= as at 28th February 2006. The defendant argued that the plaintiff advanced this amount to the 1st defendant either gratuitously or at its own risk because the 1st defendant did not approve the said loan to be advanced to it.”

As regards the 2nd and 3rd issues, the learned Judge made a finding to the effect that

“the guarantees issued by the 2nd, 3rd and 4th defendants on 27th January 1998 in favour of the plaintiff had not been discharged by the time the plaintiff allowed the 1st defendant to discount the postdated cheques issued in favour of the 1st defendant by its customers”.

This is one of the contentious issues in this appeal, which we shall revert to later.

According to the learned Judge since the guarantees had not been discharged, and the 1st respondent continued to discount the cheques as requested by the 2nd respondent, then the only plausible, logical conclusion that could be made is that these latter transactions were covered by the original guarantees. On that basis the learned Judge proceeded to find that the appellant and the 3rd and 4th respondents were compellable to pay the amounts claimed from the 2nd respondent on the dishonoured cheques.

The learned Judge also made a finding, which is also contested in this appeal, to the effect that:-

“For the avoidance of doubt, this Court finds and holds that the plaintiff did issue the notice of dishonor to the 2nd, 3rd and 4th defendants before commencing the present action.”

It is the appellant’s case that no such notice of dishonor was issued and/or served on either the 2nd respondent, or the guarantors before the suit against them was commenced.

Consequent to these findings, the learned Judge entered judgment in favour of the 1st respondent herein, and against the guarantors (appellant, 3rd and 4th respondents) in the sum of Kshs. 8,879,628/= together with interest at the rate of 13.25% with effect from 1st March 2006 until payment in full. It was that judgment that propelled the appellant to this Court on appeal, citing the following grounds:-

- 1. The learned Judge erred in fact and in law in basing his judgment on a guarantee dated 27th January 1998 executed by the appellant in favour of the 1st respondent. The said guarantee was in fact exhausted on 29th July 2002 when the loan for which it was given was repaid in full.*
- 2. The learned Judge erred in finding the appellant liable on the said spent guarantee despite having found as a fact that the appellant did not use a guarantee for the subsequent bill discounting facility given in favour of the 2nd respondent by the 1st respondent.*
- 3. The learned Judge erred in not giving effect to the evidence of the 1st respondent’s witness that the guarantee dated 27th January 1998 was spent upon the repayment of the loan facility in full to the 1st respondent in July 2002.*
- 4. The learned Judge erred in law in holding the appellant liable on the bill discounting facility yet the 1st respondent had failed to issue notices of dishonor to the drawers of the bills.*
- 5. The learned Judge erred in law in failing to consider the appellant’s written submissions.*

Grounds 1, 2 and 3 are basically a challenge on the learned Judge’s findings on the guarantees. The second limb of the appeal is based on the learned Judge’s finding to the effect the 1st respondent had issued a notice of dishonor to the 2nd respondent after the cheques in question were dishonoured.

Narwar Singh Bhogal – 3rd respondent, also filed a notice of Cross appeal pursuant to **Rule 74 of this Court’s Rules.**

We note that the five grounds of the Cross appeal are similar to those in the main appeal and we shall consequently handle them together. In both appeals, the learned Judge is also faulted for failing to consider the evidence presented to the Court to the effect that the said guarantees had actually expired, and had not been renewed to cover the subsequent facility. The said evidence was adduced by the Bank's own witness, Charles Maina Mwangi, and through the 4th defendant, and buttressed by submissions from both sides. This being a first appeal, as mandated by **Rule 29 (1) (a)** of this Court's Rules, it is incumbent upon us to re-visit the evidence adduced before the trial court, critically re-appraise the same, and arrive at our own independent decision. We must nonetheless in carrying out this important task, not lose sight of the fact that we neither saw nor heard the witnesses as they testified before the trial Court, and therefore make some allowance for that. (See **Selle vs Associated Motor Boat Company Limited [1968] EA 123.**)

We shall therefore, reconsider the evidence adduced before the trial Court, both *viva voce* and by way of submissions of counsel on behalf of the parties; the law applicable; the grounds of appeal before us; and the submissions made before us in this appeal. We have touched on some of the issues earlier on in this judgment. We note that the factual aspect of this matter is actually uncontested.

As stated earlier, the gravamen of this appeal is whether the guarantees issued by the appellant, 3rd and 4th respondents were discharged upon payment of the term loan, or were they still valid to cover the cheque discounting facility that was offered thereafter? It is the appellants case that the guarantees were only limited to the loan facility and they were discharged on payment of the loan amount within the 48 months stipulated in the guarantee.

What evidence was adduced to that effect?

The Bank's witness, who was its Credit Risk Analysis, on cross-examination by the appellant's counsel had this to say;

“By 31st May 2002, the 1st defendant had surplus funds in the account of over Ksh 10 million. The loan taken in 1998 had been paid in full between 13th May 2002 and 31st May 2002, the guarantors were not liable for their guarantees because no amount owed (sic) from May to July 2002.”

He went on to clarify that:-

“The loan issue in 1998 was a term loan. The client could access the loan by either overdrawing his account or by paying the monthly installments.”

The witness went further and conceded that;

“I do not have guarantees signed by 2nd, 3rd and 4th defendants in respect of the 2nd loan offer; Sam-con did not accept the 2nd offer.”

On the issue of whether the notice on the dishonoured cheques was issued by the bank, the witness had this to say;

“We did not issue any notice of dishonouring the cheques.”

This testimony was echoed by the appellants' counsel in their written submissions before the trial Court.

The Bank's defence was and still remains that they granted the 2nd facility on the strength of the old guarantees which they still retained in their possession. This was also the gist of their submissions before us. Only the 4th defendant, Paramjit Singh, testified before the trial Court. Narwar Singh Bhogal 2nd defendant and Gurbux (appellant) adopted his evidence.

As stated earlier, their case was that they took the fixed term loan of 40 million, payable in 48 months, and they signed guarantees for the same. The loan was paid for in full. They requested for another facility, this time a cheque discounting facility. The letter of offer was sent to them, but they never signed it, nor did they sign any fresh guarantees as requested for in the letter we quoted *in extenso* earlier on. They maintained that they had been discharged as guarantors upon payment of the term loan and they were not therefore responsible for paying for the dishonoured cheques.

We have considered this evidence along with their submissions before the trial Court. In our view, as clearly indicated in the documents exhibited in Court, the first facility was a fixed term loan and not an overdraft facility. We have quoted the bank's witness's testimony verbatim elsewhere to that effect.

We do not need to belabour the point, but we do not see how the learned Judge in the light of the documents before him, and the Bank's witness' concession, could have arrived at the conclusion he did. With profound respect to the learned Judge, we hold the view that he did err in that respect. That being so, we find that the guarantees which had been held as security for the fixed term loan, expired upon the full payment of the loan in question.

In our view, the bank was well aware of this fact, and that is why in their letter of offer dated 1st August 2002, one of the items requested for was;

“Individual guarantees for Ksh 40,000,000/=, by each of the directors of the company viz – Nawar Singh Bhogal, Gurbakesh Singh Bhogal, and Paramji Singh Bhogal.”

If indeed, the Bank believed that the old guarantees were valid then why did they need to ask for fresh signed guarantees? We are in agreement with Mr. Shah, learned counsel for the appellant that:

“There cannot be perpetual guarantees.”

We cite with approval the learned authors' views in **“The Law of Guarantees”** by Geraldine Andrews & Richard Miller, 3rd Edition or para 9.01 on page 274 where they

state;

“Since the purpose of a guarantee is to secure the performance of the principal's obligations towards the creditor, the surety will be discharged for his liability under the guarantee if the principal pays the debt or performs the obligation which the surety has guaranteed... payment of the principal debt by the principal will discharge the surety.”

Surely, if the facility had been settled in full, and the terms had not been varied, modified, or renewed as contemplated in paragraph 1 of the guarantee signed by the guarantors, then the guarantors were not required to give the three month notice referred to in paragraph 3 of the said guarantee. Had the Bank intended to use the same guarantees to secure the subsequent facility, then, all it needed to do was to fall back on paragraph 1 of the said guarantee, and extended the guarantee which had already expired.

We also re-emphasise that from the evidence placed before the High Court, the Bank had agreed to discount the cheques on *ad hoc* basis, each cheque being considered on its merit. That would definitely not have been the case if the said facility was secured by duly executed, valid guarantees.

On the first prong of the appeal and cross-appeal, we must find for the appellants. Although this point alone would have determined this appeal, we find it important to deal with the second issue as to whether the notice of dishonor was issued on the principal i.e the 2nd respondent. As stated earlier, the Bank's witness conceded that they did not issue any notice dishonouring the cheques. Mr. Murugara, learned counsel for the Bank's contention was that there does not need to be a formal notice of dishonour. In his view, such notice can be by way of exchange of correspondence.

On his part, Mr. Sarvia, learned counsel for the appellant, submitted that **sections 48, 49 and 50 of the**

Bills of Exchange Act clearly set out the law on this issue. Section 48 of the said Act provides as follows:-

“Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or non-payment, notice of dishonor must be given to the drawer and each endorser, any drawer or endorser to whom such notice is not given is discharged.”

Although Mr. Murugara submitted that the notice of dishonor can be served by way of exchange of correspondence, no such correspondence to the 2nd respondent was pointed out to us. Indeed, the learned Judge though not making any finding as to whether the 2nd respondent had been served with the notice of dishonour or not, went on to find that the guarantors had been served. Unfortunately, no such notice of dishonor, either to the principal or to the guarantors has been shown to us.

As far as the 2nd respondent is concerned, we observe that it did, specifically at paragraph 7 of its statement of defence, deny that any notice of dishonour had been issued to it as the endorser of the cheques in question. Pursuant to **section 48 of the Bills of Exchange Act**, liability to make good or pay for dishonoured cheques is pegged on the notice of dishonor. Compliance with that provision is mandatory. Where no such notice has been issued, then liability cannot attach.

It was therefore incumbent on the Court to confirm from the evidence before it, whether such notice had actually been issued in respect of the 2nd respondent, or not. That was not done, and as rightly submitted by Mr. Sarvia, for the 4th respondent, the learned Judge failed to make any specific finding on that issue. In the circumstances, and in view of the PW1’s concession, mentioned earlier, we find that no notice of dishonor was issued on the 2nd respondent as required under **section 48 of the Bills Of Exchange Act**. That non-compliance absolved the 2nd respondent of all liability in respect of the said cheques.

As far as the other respondents are concerned, it is not in dispute that they were neither the drawers, nor the endorsers of the cheques in question. There was no requirement in law for a notice of dishonor to be issued to them. The finding by the learned Judge to the effect that they had been served, though erroneous, was otiose and of no consequence as far as their culpability was concerned.

In sum therefore, we find both the appeal and cross-appeal merited. We allow them with the result that the Judgment and decree of Kimaru, J rendered on 27th March 2012 is hereby set aside, and in its place thereof substituted an order dismissing the plaintiff’s suit before the High Court.

Although we were asked, by the appellant/ Cross appellant to award costs for two counsel, we appreciate the fact that costs are at the discretion of the court. Though not in any way belittling the complexity of this matter, in our view, one counsel would have handled the matter just as efficiently as two counsel did.

Accordingly, the appellant, Cross appellant, and the 4th respondent shall have costs of this appeal and before the High Court.

Costs in respect of the appellants will be for one counsel each.

Dated and delivered at Nairobi this 12th day of February, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR