REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 11 of 2000

KENINDIA ASSURANCE COMPANY LIMITED ……..APPELLANT

AND

COMMERCIAL BANK OF AFRICA LIMITED

NJOROGE MUNGAI

SURENDRA JETHLAL SHAH….....….....…RESPONDENTS

(Appeal from a decree of the High Court of Kenya at Nairob (Ransley, C.A) dated 24th November, 1999

in

H.C.C.C. NO. 1347 OF 1998)

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JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (P.J. Ransley – Commissioner of Assize – as he then was – "the Commissioner") delivered on 24th November, 1999 in which the learned Commissioner gave summary judgment in favour of the plaintiff ***Commercial Bank of Africa Ltd*** against the 1st Defendant ***Kenindia Assurance Co. Ltd*** in the High Court Civil Case No. 1347 of 1998.

By a plaint dated 18th June, 1998 ***Commercial Bank of Africa*** Ltd as the plaintiff sued ***Kenindia Assurance Company Ltd*** as 1st Defendant, ***Njoroge Mungai*** as 2nd Defendant and ***Surendra Jethalal Shah*** as the 3rd Defendant. In that plaint the plaintiff sought judgment to be entered against the defendants as follows: -

> ***"(a) As against the 1st Defendant: -***
>
> ***(i) Principal amount under the Financial Guarantees as at the date of first demand namely 13th November, 1997 …….. Kshs. 20,000,000/=.***
>
> ***(ii) Interest on (i) above at the rate of 31.5% per annum from 13th November, 1997 until 31st May, 1998 …… Kshs. 3,736,940/=.***
>
> ***Total Kshs. 23,736,940/="***

Pursuant to that plaint the plaintiff took out a notice of notion under ***Order XXXV Rule 1(i) (a), (2)*** and ***9*** of the ***Civil Procedure Rules*** and ***section 3A*** of the ***Civil Procedure Act*** seeking the following orders: -

> ***"1. THAT judgment be entered for Plaintiff as follows: -***
>
> ***(a) As against the 1st Defendant the sum of Ksh. 23,736,940.00 due and owing to the Plaintiff as at 31st May, 1998 together with interest accrued on the said outstanding amount at the commercial rates prevailing from time to time (currently 31.5% per annum) from 1st June, 1998 until payment in full.***

(b) As against the 2nd and 3rd Defendant, respectively, the sum of Kshs.29,708,782.70 due and owing to the Plaintiff as at 22nd April, 1998 together with interest accrued on the said outstanding amount at the commercial rates prevailing from time to time (currently 31.5% per annum) from 23rd April, 1998 until payment in full.

2. THAT the costs of this suit and this Application be awarded to the Plaintiff against the Defendants jointly and severally."

It was that notice of motion that came up for determination before the superior court. It was the plaintiff's contention that the defence by the 1st defendant raised no triable issues and hence the plaintiff sought summary judgment against the 1st defendant as prayed in the plaint. The learned Commissioner considered the rival submissions before him and came to the conclusion that the 1st defendant's defence disclosed no triable issues. In the course of his ruling the learned Commissioner stated, *inter alia*: -

"The plaintiff has exhibited correspondence which is marked without prejudice to its affidavit in support in which Messrs. Inamdar & Inamdar for the 1st Defendant accepted that there was liability for Shs.20 million by the 1st Defendant subject only to securing the securities held. Mr. Gautama quite rightly points out that the plaintiff is not seeking judgment on admissions. The correspondence does support Mr. Dhanji's submissions that the 1st Defendant accepted that its liability was absolute and was not concerned with the terms of borrowing."

Having so stated the learned Commissioner granted the plaintiff's application by concluding thus: -

"In the result, I do not think that the First Defendant has shown there are triable issues and I give judgment against it as prayed for in the Notice of Motion."

Being aggrieved by that ruling the appellant (Kenindia Assurance Company Ltd) filed this appeal citing some eight grounds: -

"1. The learned Commissioner of Assize erred in entering summary judgment against the First Defendant (the Appellant herein).

2. The learned Commissioner of Assize erred in failing to dismiss the Plaintiff's application on the ground that the Plaintiff had given no explanation for filing the application for summary judgment four months after the First Defendant had filed its defence.

3. The learned Commissioner of Assize erred in failing to hold that the First Defendant had shown, both by its Defence and by the affidavit of Ravinder Kumar Kaul filed on its behalf, that there were triable issues which warranted the granting to it of unconditional leave to defend the action.

4. The learned Commissioner of Assize erred in law in failing to consider and rule upon all the matters raised in the said Defence and affidavit.

5. The learned Commissioner of Assize erred in holding that the First Defendant was not concerned with the securities given or agreed to be given under the contract between the Plaintiff and the principal debtor, Proost Paper (East Africa) Limited.

6. The Learned Commissioner of Assize erred in law in failing to appreciate that a guarantor's right to rely on the creditor's impairment of, or failure to obtain, the securities given or agreed to be given under the latter's contract with the principal debtor, does not depend on the guarantor's knowledge of those securities at the time of giving the guarantee.

7. The learned Commissioner of assize erred in law in relying on the alleged "merger" between the Plaintiff and CBA Finco in order to reject the First Defendant's defence that its guarantee did not extend to or cover the original lending made by the Plaintiff and CBA Finco to Proost paper (E.A. Ltd).

8. The learned Commissioner of Assize erred in relying upon the alleged "admissions" contained in the without prejudice correspondence exchanged between the advocates of the Plaintiff and the advocates of the first Defendant."

It was this appeal that came up for hearing before this Court commencing on 11th July, 2005 and adjourned to 5th October, 2006 when counsel appearing for the parties concluded their submissions. Mr. Satish Gautama, assisted by Mr. Mogeni, appeared for the appellant while Mr. Njoroge Regeru, assisted by Fellicine Oriri, appeared for the 1st respondent. It should be pointed out that the 2nd and 3rd respondents did not participate in this appeal since they as the 2nd and 3rd defendants in the High Court suit were granted leave to defend the suit. That suit is still pending in the superior court.

This appeal was argued with considerable force by Mr. Gautama who carefully took us through what transpired in the superior court during the hearing of the application for summary judgment. He submitted that in his view there were 14 triable issues. It was Mr. Gautama's contention that the judgment by the superior court was very superficial having been prepared under great pressure of work. It was argued further that as the borrower renegotiated the terms of lending, that would discharge the surety.

Mr. Gautama then turned on the law as it relates to guarantees. He submitted that as no fresh guarantee was sought from the appellant there was material variation of terms which in his view raised triable issues in law. He complained that the loan of 55 million was increased to 64 million without the appellant's knowledge or consent.

Mr. Gautama then embarked on enumerating various points which he called triable issues. Although in his opening remarks Mr. Gautama had submitted that there were at least 14 triable issues he was however able to enumerate only four.

Relying on the judgment of Chesoni J. (as he was then) in **Richard H. Page & Associates Ltd v. Ashok Kumar Kapoor [1979] KLR 246** Mr. Gautama submitted that the application for summary judgment ought to have been made immediately after the defence had been filed and that since issues had been framed the appellant should have been allowed to defend the suit. In Mr. Gautama's view, this was not a fit case for summary judgment.

Mr. Gautama complained that in his submissions before the superior court he had relied heavily on the decision in **China and South Sea Bank Ltd v Tan [1989] 3 All E.A 838** and yet in the ruling delivered by that court the learned Commissioner never referred to that authority.

As he concluded his long submissions Mr. Gautama reminded us that the issue was whether the learned Commissioner was right in saying that there were no triable issues. He strongly urged us to allow this appeal. In his strong belief that he had a very good appeal Mr. Gautama, perhaps with a light touch, warned us that this appeal would only be dismissed over his dead body! In his view there was no any other option but to allow this appeal.

When he stood to respond to Mr. Gautama's submissions Mr. Regeru submitted that the parties were engaged in three distinct transactions. There was the borrowing by ***Proost Paper*** of Shs.55 million which was increased to Shs.64 million. These amounts were secured by a debenture. The second set of documents related to personal guarantees of the 2nd and 3rd defendants. Lastly, there was the third set which involved two financial guarantees given by the appellant in favour of the 1st respondent. Each guarantee was for Shs.10 million. These were to run from year to year and the appellant kept extending them.

It was Mr. Regeru's contention that the appellant had no connection with the underlying contract and that it was not even concerned with the goings on between the bank (1st respondent) and the customer. He pointed out that the appellant did not even see the letter of offer. He submitted that the appellant's liability was fixed at Shs.20 million.

As regards the decision in **China and South Sea Bank Ltd** (supra) Mr. Regeru submitted that equity would only come in if the contract is oppressive, shocking and unconscionable. But, in the present case Mr. Regeru pointed out that we are dealing with a sound commercial transaction between two equal parties based on a standard form contract.

Lastly, Mr. Regeru submitted that the learned Commissioner was right in his ruling as the 1st respondent was entitled to summary judgment as the defence raised no triable issue. He therefore asked us to dismiss this appeal with costs.

We have carefully considered the genesis of this appeal and while we appreciate the formidable submission by both Mr. Gautama and Mr. Regeru we are of the view that the issue before us was whether the learned Commissioner was right in entering summary judgment in favour of the 1st respondent (the plaintiff in the superior court). It is important to consider what led to the application for summary judgment. The plaint sets out the nature of the claim against the appellant. This was based on two financial guarantees dated 6th March, 1995 and 27th July, 1995 for Shs.10,000,000/= each. That was set out in paragraph 8 (b) of the plaint. The written statement of defence by the 1st defendant is set out at pages 24 – 28 of the record. We have perused this statement of defence but what is rather interesting is that it does not deal specifically with the issue of two financial guarantees but goes into issues of Shs.55 million being increased to Shs.64 million.

The main document governing the relationship between the appellant and the 1st respondent was the Guarantee and Indemnity Document which, as correctly pointed out by Mr. Regeru, was a commercial transaction between two equal parties. This was a standard form contract. Clauses (k) and (m) of that document provide: -

> "***(k) The Bank without giving notice to the company may at any time without prejudice to this Guarantee and Indemnity and without discharging or in any way affecting the Company's liability hereunder: -***
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> **(i) determine vary or increase any credit to the Customer;**
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> **(ii) grant to the Customer or to any other person any time or indulgence;**
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> **(iii) renew any bills notes or other negotiable securities;**
>
> **(iv) take vary deal with exchange release modify or abstain from perfecting or enforcing any securities or other guarantee or rights which the Bank may now or hereafter have from or against the Customer or any other person;**
>
> **(v) compound with the Customer or with any other person;**
>
> **(vi) make any other arrangements with the Customer or any other person."**
>
> "***(m) This Guarantee and Indemnity shall be in addition to and shall not in any way be prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the moneys and liabilities hereby guaranteed nor shall such collateral or other security or any lien to which the Bank may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of the moneys and liabilities hereby secured be in anywise prejudiced or affected by this***

present Guarantee and Indemnity; and the Bank shall have full power at its discretion to give time for payment to or to make any Guarantee and Indemnity or any liability hereunder, and all moneys received by the Bank from the company or| the Customer or any person or persons liable to pay the same may be applied by the Bank at its sole discretion to any account or item of account or to any transaction to which the same may be applicable; and nothing herein contained shall operate to merge or extinguish the company's liability under any bill or bills of exchange accepted or endorsed by or on behalf of the Company or the Customer of which the Bank is the drawer or holder in due course and this Guarantee and Indemnity shall not prejudice the Bank's right or remedies under any such bill or bills."

In view of the foregoing the submissions as regards variation have no basis. Clearly, the liability of the appellant was fixed at Shs.20 million. This is the amount that the bank (1st respondent) sought to recover. Looking at the defence filed by the appellant, can it be seriously argued that there was a triable issue raised? Perhaps, it may be appropriate to consider on what grounds the application for summary judgment was made. These grounds were set out as follows: -

"***(a) At the request of Proost Paper (EA) Limited (the company) the Plaintiff advanced to the Company various credit facilities on specified terms and conditions as more specifically set out in the Letter of Offer dated 27th February, 1995 and the Subsequent letter of Offer dated 26th November, 1996.***

(b) As part of the security for the aforesaid lendings by the Plaintiff to the Company, the 1st Defendant duly issued in favour of the Plaintiff two financial Guarantees for Ksh.10,000,000/= each dated 6th March, 1995 and 26th July, 1995 respectively.

(c) As part of the security for the aforesaid lendings by the Plaintiff to the Company, the 2nd and 3rd Defendants, respectively each executed a Personal Guarantee on 7th April 1995 for the principal sum of Kshs.55,000,000.

(d) ***The aforesaid Financial Guarantees and Personal Guarantees secured due repayment of, inter alia, the respective principal amounts stipulated therein together with such interest as would from time to time be payable thereon.***

(e) In accordance with the terms and conditions of the lendings to the Company, the Plaintiff duly advanced the agreed funds, and otherwise granted financial accommodation to the Company.

(f) In breach of its obligations of the terms and conditions of the lendings to it and in violation of its obligations thereunder the Company refused, neglected and/or otherwise failed to make scheduled repayments to the Plaintiff.

(g) Accordingly, the Plaintiff through its Advocates on record wrote to the 1st Defendant on 13th November, 1997 demanding payment of a sum of Kshs.39,634,083.50 due and owing from the Company to the Plaintiff as at 31st October, 1997 together with such interest as would accrue thereon at the rate of 30.5% per annum from 1st November, 1997 until payment in full.

(h) Further the Plaintiff through its Advocates on record wrote to the 2nd and 3rd Defendants respectively on 11th November demanding payment of a sum of Kshs. 39,634,083.50 due and owing from the company to the Plaintiff as at 31st October, 1997 together with such interest as would accrue thereon at the rate of 30.5 per annum form 1st November, 1997 until payment in full.

(i) In addition to the foregoing and in exercise of its rights under the Debenture dated 3rd May, 1995 issued by the Company in favour of the Plaintiff, the Plaintiff duly appointed a Receiver and Manager over the assets of the Company on 29th October, 1997 who subsequently thereto disposed of the said assets and recovered part of the outstandings due and owing from the Company to the Plaintiff. However, a sum of Kshs.29,708,782.70 remained outstanding as at 22nd April, 1998 together with interest accruing thereon at the rate of 31.5% per annum form 23rd April, 1998 until payment in full.

(j) Since the institution of this suit, a further amount of Kshs.941,949.10 realised from the disposal of the assets charged under the Debenture has been appropriated towards the partial liquidation of the amount owing from Company to the Plaintiff, and the claim herein shall be reduced accordingly.

(k) Notwithstanding demand having been made to the 1st Defendant to settle the aforesaid outstanding amount pursuant to the Financial guarantees issued by it in favour of the Plaintiff the 1st Defendant has refused neglected and/or otherwise failed to settle its liability thereunder in an amount of Kshs.23,736,940.00 due and owing as at 31st May, 1998 and on which amount interest continues to accrue at the rate of 31.5% per annum from 1st June, 1998 until payment in full.

(n) The Defendants respectively are justly and truly indebted to the Plaintiff and were so indebted at the commencement of this suit as more particularly set out in the Plaint therein."

The law on summary judgment procedure is now well settled. This is a procedure to be resorted to in the clearest of cases. In **Dhanjal Investments Limited v Shabaha Investments Limited (Civil Appeal No. 232 of 1997** (unreported) this Court stated: -

" ***The law on summary judgment procedure has been settled for may years now. It was held as early as in 1952 in the case of Kandnlal Restaurant V Devshi & Co. (1952) EACA 77 and followed by the Court of Appeal for Eastern African in the case of Sonza Figuerido & Co Ltd v Mooring Hotel Limited [1952] EA 425 that, if the defendant shows a bona fide triable issues he must be allowed to defend without conditions….."***.

And in Provincial Insurance Company of East Africa Limited now known as UAP Provincial Insurance Limtied v Lenny M Kivuli Civil Appeal No. 216 of 1996) (unreported), this court again stated: -

" In an application for summary judgment even one triable issue if bona fide, would entitle the defendant to have unconditional leave to defend."

Lastly, in Kenya Trade Combine Ltd vs M M Shah (Civil Appeal No 193 of 1999) (unreported), this court said:

" In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."

The above was cited with approval in the recent decision of this Court in **Five Continents Ltd v. Mpata Investments Ltd [2003] KLR 443**.

We have now looked at the pleadings, the grounds in support of the application for summary judgment, the submissions by counsel before us and we are of the view that there were indeed three distinct transactions. The transaction relating to Shs.20 million was a separate one comprising two financial guarantees by the appellant. This fixed the appellant's liability at Shs.20 million, and really had nothing to do with the arrangements between the borrowing company, i.e Proost Paper EA Ltd and the lending Bank.

Mr. Gautama complained that his authority of **China and South Sea Bank Ltd v. Tan** (supra) was never referred to by the superior court in its ruling. We have taken particular interest in this authority. In that authority the Privy Council held that: -

"The tort of negligence had not supplanted the principles of equity nor did it contradict contractual promises or complement the remedy of judicial review or supplement statutory rights. Since the rights of a surety continued to depend on the principles of equity it followed that unless the security was surrendered, lost, rendered imperfect or altered in condition by reason of what had been done by the creditor the surety remained liable under his contract to pay the creditor if the debtor failed to do so, and the creditor was entitled to sue him instead of pursing his claim against the debtor or selling the mortgaged securities. Moreover, the creditor was not obliged to do anything and was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all and did not become a trustee of the mortgaged securities and the power of sale for the surety unless and until he was paid in full. It followed therefore that since the bank did not act injurious to the surety or inconsistent with his rights and did not omit any act which its duty enjoined it to do the surety was liable under the contract of guarantee to repay the bank the principal sum advanced with interest."

With the greatest respect to Mr. Gautama this authority does not advance his case any further especially in view of clauses (k) and (m) of the Guarantee and Indemnity document which clauses we have already reproduced in this judgment. We have considered all that has been ably submitted to us by way of authorities for which we are most grateful and without dealing with each of them we are of the same view as the superior court that the appellant's defence did not raise any triable issue and that the 1st respondent was indeed entitled to summary judgment. Accordingly, this appeal must be and is hereby dismissed with costs to the 1st respondent. And it is our sincere hope that the dismissal of this appeal will not inflict any injury, fatal or otherwise, upon Mr. Gautama's health.

Dated and delivered at Nairobi this 8th day of December, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR