REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 4270 OF 1989.

KENYA COMMERCIAL

FINANCE CO. LTD..PLAINTIFF

VERSUS

JOHN MATERE KERIRI...DEFENDANT

J U D G M E N T

By a Commitment Letter (the letter) (Exh.2) dated the 26th. July l983 the Plaintiff agreed to provide financial assistance to Maji Limited (the company) on the terms contained in the Letter.

Paragraph 8 of the letter was on the following terms.

> "Repayment of the Overdraft and the loan and payment of interest thereon and other sums payable by the Borrower to the lenders in respect thereof shall be secured by the securities specified in part Four of the said Schedule hereto which shall in form and substance satisfactory to the Lenders and, if so required by the Lenders prepared by the Lenders' Advocates at the expense of the Borrower."

Schedule 4 provides for a date for completion of the securities being 30.8.93 and set out details of the securities required including personal guarantees from the following:-

1. Mr. J.C,. Poppleton of P.O. Box 56534, Nairobi.

2. Mr. W. J. Poppleton of P.O. Box 56534, Nairobi.

3. Mr. E Munyinyi of P.O. Box 56534, Nairobi.

4. Mr. E. Benson of P.O. Box 56534, Nairobi.

5. Mr. J. Poppleton of P.O. Box 56534, Nairobi.

6. Mr. J. Keriri of P.O. Box 56534, Nairobi.

7. Mr. J. B. Hayley of P.O. Box 56534, Nairobi. .

One of the proposed guarantors was the Defendant who signed a written guarantee (Exh. 3) together with J.C. Poppleton and J. Poppleton who were two others named in the list referred to in Schedule 4.

The Defendant is sued in this suit for Shs.1.5million in the amended plaint together with interest at l8% per annum from 15Th. August l989 until payment in full and costs. The Statement of Defence denies the claim and provides only some of the defences namely that the plaintiff had prejudiced the Defendants rights by acting wrongly in connection with the sale of the company's assets. He also relied on the fact that the Plaintiff did not obtain guarantees from four of the other persons named in the fourth schedule. This latter defence was not pleaded and in order to consider it I amend the defence to include as a new paragraph 4(a) the following defence

"14a The Defendant entered into the guarantee on the condition that all of the persons from whom guaratees were sought had signed guarantees" In his submission Mr. Oyatci for the Defendant sought to rely on paragraph l4(c) of the Letter which is in the following terms.

> "If all the securities required by the Lenders have not been completed to the satisfaction of the Lenders by the date shown in part Four of the said Schedule hereto the Lenders shall not be obliged to make any advances on the Overdraft or on the Loan and may withdraw without prejudice to its right to recover from the Borrower all expenses incurred by the Lenders".

He submitted that the loan could only have been given to the company after the completion to the satisfaction of the Lenders of the securities referred to in paragraph 8.

This such paragraph merely gives the Plaintiff the option of lending or not if the securities were not in place to its satisfaction.

In his evidence the Defendant in his evidence in chief said,

"I was one of seven guarantors. I signed Exh. 3. The guarantors have local adresses. At the time of signing they were in the country, they left Kenya in about 1988" and in cross examination.

"It was a condition that guarantees from the others would be obtained. It was the Bank fault."

I accept that the Defendant expected that all the proposed guarantors would sign guarantees and that this was the condition on which he signed his guarantee.

The Defendant also complained of the Plaintiff's actions in selling the company's property and said'

"If the deposit of 1.3 had been forfeited and the property resold in l987 it would have been sufficient to pay off the full sum due. The Plaintiff was very unfair as they did not take any care of my interest. the

delay in crediting the company account and the delay in receiving the balance of the sale price caused the company and me a lot of financial hardship"

The Defendants complaint relates to the fact that the company land was sold at public auction and that the purchaser who had, so the plaintiffs witness said 30 to 90 days to pay the full sale price did not do so but was given further time to pay and was not charged interest on the late payment.The property was sold on the 22nd January l987 but it was not until the l7th day l987 some sixteen months later that the cheque for l,350,988.15 was sent tot he Plaintiff (Exh. 4). From Ex. 6 it appears that on the 22nd January l987 the company owed Kshs.2,254,487.00 which would have been reduced to Shs.903,468.85. Additionally the Defendant claims that the company's machinery was sold at an under value. In his evidence in cross-examination the Plaintiff witness said

"Company had equipment in a warehouse in Mombasa. Imported Machinery plus motor vehicles and other immovable assets. I am not sure if company owned a godown. We received Shs7,847/- and Shs.2,233/- about Shs9000/- roughly. Iam not aware that if property sold we were to look after the interests of the debtor" This last reference to debtor was intended to refer to the Defendant.

In his evidence in chief the Plaintiff said,

"I (the company) owned factory buildings and godown thereto. Also motor vehicles machinery in the factory tools and equipment. Machinery in Bond which was new" and later,

"On aggregate the properties of the company would have fetched not less than Shs.2 million" The machinery in bond which was new had cost one million alone. It is inconceivable that after selling the moveables the company was only credited with a sum of Shs.9000/-.

The Defendant complained that the immovable property was sold at less than market value. The duty of the Plaintiff to the company was to recover what it could and owed no special duty to the company to look after its interests. It has been held that the sum at which a property is sold at public auction is its market value.

The Plaintiff does however owe a duty to ensure that the guarantor is not prejudiced by its actions for if the guarantor is prejudiced then he may be discharged from liability.

It is necessary to consider the extent of the Defendants liability under the written guarantee (Ex,3) Clause 1(0) of which is on the following terms;-

> "The Finance Company shall be at liberty to release or discharge any one or more of us from the obligations of this Guarantee or to accept any composition from or make any other arrangements with any one or more of us without thereby releasing or discharging the other or others of us or otherwise prejudicing or affecting the rights and remedies of the Finance Company against the other or others of us and his or their respective executors administrators and legal representatives whether or not he or they shall have notice thereof.

This clause relates to the guarantor who have signed namely the Defendant and Mr. J.C. Poppleton and Mr. J.Poppleton. There is no evidence that the Plaintiff did release or discharge either of them from the obligations of the guarantee. However, no where in the written guarantee does it say that the Defendant

would be liable if any intended coguarantors with himself did not execute a written guarantee. In the case of James Graham & Co. Vs, Southgate Lands (l985 ALL E.R 344 it was held that it was necessary for a court to determine what was the contract the guarantor had entered into. In that case a guarantor was absolved from liability as one of the co-joint guarantees was forged. O'Connor L.J. in that case extensively reviewed the authorities and at page 354 found as follows:

"I do not think it makes any different in this case that the Plaintiff did not know that Whitfields signature was forged. The fact is that they are seeking to charge the defendant with a contract into which he did not enter He is not liable in law".

The commitment letter Exh. 2 was an agreement between the Plaintiff and Company to which the Defendant was not a party. However it provided that part of the securities would be seven written joint and several guarantees of which one would be given by the Defendant. The Defendant was aware of this requirement and as he says in his evidence that it was a condition that all of the proposed guarantors would sign. The Defendant could have expected that guarantees would be obtained from all seven proposed guarantors and that the contract he entered into was one in which seven joint and severally guarantees would be obtained. This was not done and the Defendant is entitled both in law and equity to be relieved from liability under his guarantee.

I now turn to the Defendants plea that he was prejudiced by the manner in which the Plaintiff dealt with the securities and particularly the non-crediting of the deposit received for the immovable property and the opponent failure to obtain a reasonable sum for the moveable. In the case of Patel Vs. Grindlays Bank 1970 EA at page 132 Sir Charles Newhold P. said at line 1e,

"The law has always been jealous to protect a guarantor who, especially in continuing and fluctuating liability is very much at the mercy of the creditor" These words were cited with approval by Spring V. P. At Page 538 of Reid Vs. National Bank of Commerce l97l E.A page 121.

I would respectfully agree with those words of Sir Charles Newhold and say that the creditors right to recover under a guarantee is considerably different from a creditors right to enforce a charge over property. As in the prior case the rules of equity apply whereas in the latter the liability or not of the debtor is a matter of Law.

It appears that in this case the plaintiff did not have due regard to the interests of the Plaintiff in dealing with the company's securities and property and as such, I would discharge the Defendant from liability on this ground.

In the result, I dismiss the Plaintiffs suit with costs to the defendant.

Dated and delivered at Nairobi this 14th day of October, 1999.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.

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