REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, TUNOI & SHAH, JJ.A)

CIVIL APPEAL NO. 13 OF 1994

BETWEEN

NATIONAL BANK OF KENYA LIMITED .....APPELLANT

AND

DEVJI BHIMJI SANGHANI and JADVA BHIMJI SANGANI trading under

the name and style of SANGHANI BUILDERS .....RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of

Kenya at Nairobi (Hon. Mr. Justice Shields) issued

on the 15th day of May, 1991

in

H.C.C.C. NO. 2004 OF 1984)

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JUDGMENT OF TUNOI, J.A.

The facts out of which this appeal arises are fully set out in the judgment of Kwach, J.A. and I need not repeat them.

However, I respectfully disagree with the conclusions reached by him.

The principal ground in this appeal is that the learned judge erred in finding that the two letters of 5th July, 1978 and 20th July, 1978, with or without the addition of the alleged assurance of Mr. Nyammo, were guarantees given by the appellant to the respondents for good consideration, and that he ought to have found them no more than letters passing between two banks, without intention to bind the bank of one customer to pay under a guarantee to the customer of the other bank.

The respondents had 28 years' working experience. They had over a course of time completed many complex projects.

Building contracts as well as guarantees and assurances were common play to them. Before executing the contract they informed Suresh Kapila, the architect for the project for construction of Ngumo Estate Phase-1 that they required guarantee for payment. Mr. Nyammo, the chairman of Pentax, got in touch with them and told them to go and see him. This they did at his office in the National Bank building. As per uncontroverted evidence in the superior court, the respondents and Mr. Nyammo discussed the issue of guarantee for payment and they were assured it was forthcoming and only when the said two letters were shown to them, did they commence work. It seems to me that there is an irresistible inference from all the circumstances of this case that the respondents left the office of Mr. Nyammo on 5th July, 1978 firmly and honestly believing as a result of what was said to them by Mr. Nyammo that the appellant would pay whatever Pentax owed them up to completion of the contract. That is why they moved on to the site and completed the work on schedule. With their experience they could not possibly have rushed into work without firm assurance that payment was forthcoming.

At the trial Devji Bhimji Sanghani, one of the partners in the respondents' firm, gave evidence on behalf of the firm.

He testified that before they signed the building contract they saw the architect for the work. They told him that they would not start work until they got a letter of guarantee from a bank. Mr. Nyammo, later got in touch with them and told them to see him in his office in a building that also housed the appellant, National Bank. Mr. Sanghani stated:-

> "We went on 5th July, 1978 to Nyamu's office in National Bank. Went with brother, I discussed guarantee for payment. He said don't worry he picked up the telephone and telephoned the National Bank of Kenya concerning the guarantee we discussed. He told me he had arranged for guarantee letter from National Bank of Kenya. His Bank will write to my Bank Barclays regarding the payments and he told me to enquire there with my Banker after a few days. I told him that if we get it, I will trust you, I signed the Agreement. Signed Agreement on his assurance."

This testimony and the account of what transpired between Mr. Nyammo and the respondents remain unchallegend. I am prepared to believe that what they told the trial judge did indeed happen. The parties were ad idem in the substance of what was understood and agreed between them.

In Edwards vs. Skyways Ltd [1964] 1 All E.R. 494 at 500 Skyways Ltd., the defendants, found it necessary to declare redundant some 15% of the pilots in their employ. The secretary of Skyways Ltd, at a meeting with representatives of the airline pilots union, agreed that-

> `Pilots declared redundant and leaving the company would be given an ex gratia payment equivalent to the company's contribution to the Pension Fund (and, in addition) ... a refund of their own contributions to the fund.'

Edwards, in reliance on that agreement, left the company and claimed payment under it. The company

purported to rescind its decision to make the ex gratia payment on the ground that it had obligations to creditors and the promised ex gratia payments were not enforceable in law. The company admitted that a promise had been made to make the payments and that the promise was supported by consideration, but contended (in reliance on Rose & Frank Co. v J R Crompton & Bros Ltd [1923] 2 KB 261 at 288) that the promise or agreement had no legal effect because there was no intention to enter into legal relations in respect of the promised payment. It was argued that the mere use of the phrase `ex gratia, as part of the promise to pay, showed that the parties contemplated that the promise when accepted would have no binding force in law and, further, that there was background knowledge, concerned with the tax consequences of legally enforceable promises to pay, and present to the minds of the representatives of the parties, which gave unambiguous significance to the words `ex gratia' as excluding legal relationships. Megaw, J. rejected these arguments on the facts and on his construction of the meaning in the context of the words `ex gratia'. He held:-

> "In the present case, the subject-matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds - an intention to agree. There was, admittedly, consideration for the defendant company's promise.
>
> I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one."

In the instant case, there is no doubt whatsoever that the subject matter under consideration in the two letters is ordinary commercial transaction and nothing else. The contract for the construction of Ngumo Estate cannot be said to be of social or domestic nature and therefore not intended to give rise to legal relations. This being the case, it was not incumbent, upon the respondents to prove that they and the appellant in fact intended to create legal relations. The onus of proving to the contrary was on the appellant and the onus is a heavy one. However, the appellant did not prosecute its defence, it gave no evidence and did not call any witnesses in the form of the principal actors in the transaction, the subject matter of the suit. Thus, the appellant did not discharge that onus. What is clear, however, is that whatever was communicated by the appellant to the respondents, whether guarantee or assurance, one thing is plainly clear. A legal relationship was created and the same was intended to be acted upon and was acted on by the respondents to their detriment. The issue as to whether or not there was a privity of contract between the appellant and the respondents and whether the two letters were letters of comfort were not canvassed before the learned trial judge and I need not consider them in this appeal.

For these reasons I would endorse the findings of the learned judge and I would dismiss the entire appeal with costs to the respondents.

As the sum of Shs.6,081,292/= as dividend from the Receiver of Pentax was paid to the respondents after having been paid the entire decretal amount I would order them to pay it back to the appellant with interest at Court rates.

Dated and delivered at Nairobi this 15th day of November, 1995.

P. K. TUNOI

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JUDGE OF APPEAL