

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 560 OF 1988

NATIONAL BANK OF MALAWI

versus

SUMUKA ENTERPRISES LIMITED AND B M K MHANGO

CORAM: MBALAME, J  
Chisambiro, of Counsel, for the Plaintiff  
Mhango, of Counsel, for the Defendant  
Kadyakale, Official Interpreter

R U L I N G

CHIEF JUSTICE  
HIGH COURT OF MALAWI

- 6 MAR 1995

P.O. BOX 30244, CHICHIRI

The case was set down for hearing for two days. When the court sat on 25th January 1995 counsel raised a few preliminary points some of which were solved. There is one major preliminary objection which has necessitated this ruling. This concerns the second defendant who happened to be counsel for the first defendant and indeed for himself. It is contended that the action against the second defendant can not be maintained as it is caught by section 4 of the Statute of Frauds 1677 which is a Statute of General application existing before 1902. The plaintiff's claim is put as follows:

"The plaintiff's claim is against the first defendant as principal debtor and the second defendant as guarantor for the sum of K81,154.50 lent by the plaintiff to the first defendant."

Needless to say it is not necessary for me to at this stage narrate the circumstances surrounding the case as the facts would not be very relevant to the objection now obtaining. Suffice to say that Mr Mhango has submitted that the plaintiff's claim is caught by Section 4 of the Statute of Frauds in respect of the second defendant. He has urged the court to therefore dismiss the action in its entirety, including that against the first defendant. I must mention at this juncture that I am grateful to Mr Mhango for the authorities cited in his submission. I found them very useful and these have been of good guidance.

Section 4 of the Statute of Frauds, among other things, states that it is of essence of a guarantee that it must be evidenced by a note of memorandum in writing signed by the party to be charged or by his agent. The plaintiff's action, depending on a statute as it does, ought to plead all facts required by that statute. This was the case in *Hoyle vs Hoyle* (1893) 1 Ch. 84. Mr Mhango has also referred to this court the case of *Harburg India Rubber Co. vs Martins* (1902) 1 KB 778 where a company director guaranteed the debt of the company. It was observed at page 786:

"In my opinion a contract of guarantee arises where there is a promise to answer for the debt of another",

And at P. 792 it was said:

"Prima facie the contract (of guarantee) falls within Section 4 of the Statute of Frauds unless it can be brought under some recognised or some logical exceptions...".

The plaintiffs pleadings, brief as they are, do not seem to comply with the standards required in cases of this nature. In other words the pleadings do not state when the guarantee was made and whether the guarantee was in writing and signed by the second defendant or his agent. It has been said time and again by these courts that parties must clearly state what relief they seek so that the party being sued is aware of what charges there are against him. It is wrong in my judgment to allow a plaintiff to prove at the trial facts which are not in the pleadings. See Phillips vs Phillips (1878) 4 QBD 127. Emphasis need not be made on the fact that essentially, pleadings not to be embarrassing to the defendant, should state those facts which will put the defendants on their guard. In the instant case it is a requirement that an action brought upon a guarantee must plead in the statement of claim that the guarantee is in writing and signed by the second defendant or his agent in addition to stating the date of the guarantee. Bullen and Leake & Jacobs Precedents of Pleadings 12th Edition p. 462 clearly states that:

"In an action brought upon a guarantee the statement of claim should allege that the guarantee is in writing and signed by the defendant or his agent and should also state its date".

Consequently the action against the 2nd defendant can not stand in law as it is badly pleaded. I therefore dismiss the action in respect of the second defendant with costs. The rest of the action will proceed.

Made in Open Court this 13th day of February 1995 at Blantyre.

  
R P MBALAME  
JUDGE