IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E309 OF 2020

BETWEEN

THE CHALLENGER TRADE FINANCE

SEGREGATED PORTFOLIO OF THE

SOUTH AFRICA SPC.....PLAINTIFF

AND

DANISH BREWING COMPANY E.A. LIMITED.....1ST DEFENDANT

CHRISTOPHER WHITE .....2ND DEFENDANT

NIRAV MAHESHKUMAR DAVE .....3RD DEFENDANT

LINUS WANGOMBE GITAHI .....4TH DEFENDANT

RULING NO. 2

Introduction and Background

1. Before the court is the Plaintiff's Notice of Motion dated 14th December 2020 as amended on 17th February 2021. It is made, inter alia, under **Order 2 rule 15 (1) (a)** and **(d)**, **Order 13 rule 2** and **Order 36 rules 1 and 5** of the ***Civil Procedure Rules*** ("the ***Rules***"). The Plaintiff seeks summary judgment against the 1st, 2nd and 4th Defendants as prayed in the Plaint or in the alternative an order that the 1st, 2nd and 4th Defendants Statements of Defence be struck out and judgment be entered in favour of the Plaintiff. It also seeks an order for judgment on admission against the 1st Defendant.

2. The application is supported by the affidavit of Duncan Potts, a Senior Deal Advisor of the Plaintiff, sworn on 14th December 2020. It is opposed by the 1st and 2nd Defendants who filed a Notice of Preliminary Objection dated 10th February 2021. The 4th Defendant relies on his replying affidavit sworn on 23rd February 2021, Grounds of Opposition dated 11th February 2021 and Notice of Preliminary Objection dated 14th January 2021. There was no response from the 3rd Defendant. The parties filed written submissions in support of their respective positions.

The Plaintiff's Case

3. The facts upon which the Plaintiff's case is set out can be found in the Plaint dated 18th August 2020. It is incorporated in the Cayman Islands and invests in collateralized, short dated trade finance transactions. At the time material to this suit, the 2nd, 3rd and 4th Defendant were directors and shareholders of the 1st Defendant ("the Company"). By a Facility Agreement dated 26th September 2019 ("the Facility Agreement"), it agreed to lend to the Company upto USD 4,000,000.00 to be used for working capital purposes including but not limited to the acquisition of stock and supplies and ancillary matters thereto.

4. The 2nd, 3rd and 4th Defendants executed a continuing Guarantee and Indemnity for USD 4,000,000.00 dated 7th October 2019 in consideration of the Plaintiff making or continuing to make advances and/ or other accommodations to the Company. Under the Guarantee and Indemnity, the 2nd, 3rd and 4th Defendants guaranteed to pay to the Plaintiff on demand any and all present and future obligations and liabilities at any time due, owing or incurred by the Company to the Plaintiff, both actual and contingent and whether incurred solely or jointly and as principle or surety or in any other capacity.

5. The Plaintiff duly made the facility available to the 1st Defendant in various portions in terms of Accepted Drawdown Requests on diverse dates between 20th September 2019 and 14th April 2020. The Plaintiff now contends that the Company has defaulted in repaying the facility and now owe USD 1,073,639.13 as at 31st July 2020. The Plaintiff avers that the 1st and 2nd Defendants have admitted indebtedness and despite demand letters to the Defendants, they have failed to pay the amount due except USD 105,000.00 which was paid as partial settlement.

6. The Plaintiff prays for judgment for USD 1,073,639,12 together with fees of 2% per amount paid out and interest at 14% per annum from 31st July 2020 until payment in full and a further 2% per month from 1st August 2020, costs of the suit and interest thereon.

7. The 1st and 2nd Defendants filed a Statement of Defence dated 29th October 2020. The 4th Defendant filed its Statement of Defence dated 22nd October 2020. The Plaintiff has applied for judgment in default of appearance and defence against the 3rd Defendant. The parties have all filed written submissions which I have considered.

Whether the application is incompetent

8. The Defendants have raised the issue that the application is incompetent. The 1st and 2nd Defendants contend that the Plaintiff's application should be struck out and or dismissed as it offends the provisions of **Order 36 rule 1** of the ***Rules*** as they have not only entered appearance but have also filed their defence. They also contend and that the Plaintiff is seeking the same order for summary judgment which it sought in its application dated 18th August 2020 and which was dismissed by the Court on 30th November 2020 hence the present application is *res judicata*.

9. The 4th Defendant submits that to the extent that it seeks summary judgment, the application is incompetent as it was filed almost two months after he had filed a defence and yet **Order 36 rule 1** of the ***Rules*** provides that an application for summary judgment may be made *'where the defendant has appeared but not filed a defence'*. It also submits that the prayer seeking to strike out his defence is incompetent as it is made under **Order 2 rule 15(1)(a)** and supported by an affidavit contrary to the provisions of **Order 2 rule 15(2)** of the ***Rules*** which provides that an application to strike out grounded on the lack of a reasonable cause of action or defence shall not be supported by an affidavit.

10. The doctrine of *res judicata* is anchored in **section 7** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** which provides that:

> *No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*

11. For the doctrine of *res judicata* to apply; the issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that previously heard and determined the issue was competent to try the suit in which the issue is raised (see ***Gichuki v Gichuki*** **[1982] KLR 285**).

12. I agree with the Plaintiff that the substance of the ruling dated 30th November 2020 was that its application for summary judgment was "*premature*" having been filed before the Defendants entered appearance. I concluded that, *"save that the prayer for summary judgment is struck out"* the entire application was dismissed. The substance of the issue of summary judgment was never considered due to this procedural omission by the Plaintiff. This conclusion is in consonance with the decision of the Court of Appeal in ***African Commuters Services Limited & another v Eustace Gakui Gitonga & 2 others*** **NRB Civil Appeal No. 325 of 2017 [2019] eKLR** where it observed that a suit where the merits had not been heard and determined and the same having been previously dismissed on a technicality could not be considered as being *res judicata*.

13. **Order 36 rule 1** provides that an application for summary judgment should be made before a defence is filed. I do not think that the application is incompetent merely because it was filed after the Defendants has filed their respective statements of defence because the defence is one of the ways the Defendants are entitled to demonstrate that they have a good defence and that the matter should proceed to trial. To insist that the application is incompetent on this ground is to elevate a technicality to a fetish contrary to **Article 159** of the Constitution which requires the court to determine matter without undue regard to technicalities. In reaching this position, I am fortified by several decisions of the Court of Appeal where it has held that in determining whether or not to enter summary judgment, the court should look at the defence to determine whether it raises a triable issue (see for example ***Ternic Enterprises Limited v Waterfront Outlets Limited*** **NRB CA Civil Appeal No. 136 of 2017 [2018] eKLR**).

14. I also take the same position in regard to the argument that the application is incompetent because the motion is supported by an affidavit contrary to **Order 2 rule 15(2)** of the ***Rules***. In ***Njeri Mbugua v Kirk Mweya Nyaga*** **NRB CA Civil Appeal No. 110 of 2012 [2016] eKLR**, the Court of Appeal dismissed a similar argument as follows:

> *[31] From the above it is clear that an applicant can bring an application to strike out a pleading relying on any of the grounds listed in* ***Order VI Rule 13 (1).*** *The appellant brought his application in the court under ground* ***(a)*** *and* ***(b)*** *of*

> ***Order VI Rule 13(1)*** *of the* ***Civil Procedure Rules****. Under* ***Order VI rule 13 (2)*** *of the* ***Civil Procedure Rules*** *an application under ground* ***(a)*** *cannot be supported by evidence. However, the appellant also brought his application under ground* ***(b)*** *and under that ground he could adduce evidence. There is nothing to prevent an applicant from combining his application under grounds* ***(a)*** *and* ***(b)*** *as the appellant did. We would thus overrule the contention that the application was defective because it was supported by evidence.*

15. At the end of the day, the question for consideration is whether the Defendants' respective defences raise any triable issues.

Whether the Defendants' defences raise triable issues.

16. The basis of the Plaintiff's application is that the 1st and 2nd Defendants' defence is a bare denial which ought not to stand considering admissions made to the claim. As regards the 4th Defendant's defence, the Plaintiff states that it does not raise any triable issues as the issue raised is that the 1st and 2nd Defendants discharged him from his obligations as guarantor to the Plaintiff and yet the Plaintiff never discharged him from the guarantee. The Plaintiff argues that the guarantee issued by the 4th Defendant to the Plaintiff constitutes an independent obligation to the Plaintiff only capable of being waived, released or discharged by the Plaintiff which has never happened and the 4th Defendant's defence is inconsistent with the plain words in the guarantee he executed.

17. In their statement of defence, the 1st and 2nd Defendant admit the Facility Agreement and although they make no admission of the Guarantees and Indemnities, the Plaintiff has exhibited all the documents to its deposition. The 1st and 2nd Defendants have not denied these documents nor shown how they are defective in order to discharge them from any liability.

18. The Plaintiff's case against the 1st and 2nd Defendants is also grounded on email correspondences between the Plaintiff and the 2nd Defendant in respect of the Facility Agreement. In the series of emails exchanged between the 2nd Defendant together with other representatives of the Company and the Plaintiff not only acknowledge the debt, they also make commitments to pay the same on a number of occasions. For instance, an email dated 14th July 2020 sent by one 'Chris' for the 1st Defendant acknowledges the 1st Defendant's credit position and makes a promise that the 1st Defendant will pay USD 350,000 to the Plaintiff. In fact, when the initial demand letters were sent, the Company paid USD 105,000.00.

19. **Order 13 Rule 2** of the ***Rules*** which deals with judgment on admission provides as follows:

> *Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just.*

20. The jurisprudence relating to applications made for judgment on admission is set out in the case of ***Choitram v Nazari*** **[1984] KLR 327** where Madan, JA expresses the view that:

> *For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning*

In the same case, Chesoni Ag. JA, observed that:

> *Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions ……. It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.*

21. Since the 1st and 2nd Defendants have admitted the Facility Agreement, their defence does not set out any grounds why they are not liable under it. It comprises of bare denials which are not a sufficient defence (see ***Magunga General Stores v Pepco Distributors Ltd*** **[1987] KLR 150**). In light of the affirmative admissions contained in the correspondence between the Plaintiff and the 1st Defendant's agents including the 2nd Defendant, I find that the admissions clear and unequivocal and that no purpose will be served by proceeding for trial against the Company.

22. The 4th Defendant does not deny the Facility Agreement nor the fact that in his capacity as a director of the Plaintiff, he executed the Guarantee and Indemnity dated 7th October 2019 to secure the loan facility extended by the Plaintiff to the 1st Defendant. He states that he ceased to be a director of the 1st Defendant on 1st December 2019 after transferring his shares to the 2nd and 3rd Defendant. The thrust of his submission is that as a result, he was discharged of any liability under the Guarantee and Indemnity. This, he contends, is a triable issue.

23. The general principle guiding the court in striking out of pleadings is that the court ought to exercise circumspection in striking out any pleading unless it appears so hopeless to the extent that it cannot be saved by an amendment (see ***D.T. Dobie & Company (Kenya) Ltd v Muchina*** **[1982] KLR 1,** ***Industrial & Commercial Development Corporation v Daber Enterprises Ltd*** **[2000] 1 E.A. 75**).

24. In his statement of defence, the 4th Defendant admits that he gave the guarantee to secure the loan extended by the Plaintiff to the Company only in his capacity as a director. He states that the terms sheet provided by the Plaintiff did not require him to provide a guarantee as security for the loan advanced to the Company that he only signed the guarantee as a director of the Company with an understanding his

obligations as a guarantor would only subsist during his tenure as a director of the 1st Defendant.

25. The 4th Defendant states that he is no longer director and shareholder having transferred his shares in the Company to the 2nd and 3rd defendants in an agreement acknowledged by the Company. That the 2nd defendant executed a deed of indemnity in his favour to indemnify him against any claim or demand by the plaintiff in connection to the guarantee. The 4th Defendant further states that the acknowledgement agreement and deed of indemnity were executed by the 1st and 2nd Defendants in recognition of the fact that his obligations under the guarantee came to an end when he ceased to be a director of the 1st defendant.

26. I must state that the facts upon which the 4th Defendant's defence is founded, particularly the fact that he executed the guarantee in favour of the Company, are not in dispute. Although he admits he executed the guarantee as a director, he disclaims liability on the ground that he is no longer a director and or shareholder. Whether the 4th Defendant is liable under the guarantee and indemnity he executed is, in my view, not a bona fide triable issue.

27. As the Plaintiff rightly points out, the Guarantee and Indemnity is an independent and collateral agreement between the Plaintiff and the 4th Defendant as a guarantor (see ***Gideon Letoya ole Hapu and Another v Estate Finance Company of Kenya Limited*** **NRB CA Civil Appeal No. 259 of 2011 [2019] eKLR**). In ***Kenindia Assurance Company Ltd v First National Finance Bank Ltd*** **NRB CA Civil Appeal No. 328 of 2002 [2008] eKLR**, the Court of Appeal discussed the nature of a guarantee wherein it held that:

> *It is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security of guaranteeing payment by a third party. In such cases, the most important factor to consider before liability can attach is whether there has been default. Once default is established and there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security.*

28. Since the 4th Defendant is a guarantor, it is only the Plaintiff who can discharge him from his contractual obligation. The 4th Defendant has not pleaded anything in his defence that would otherwise discharge him from his obligation to the Plaintiff. He is of course entitled to pursue indemnity from the 1st and 2nd Defendants which is an issue that does not involve the Plaintiff. I therefore find and hold that his defence does not raise any bona fide triable issue. He has been issued with a demand and is accordingly liable for the debt admitted by the 1st Defendant. His defence is accordingly struck out.

Conclusion and Disposition

29. I have found that 1st Defendant has admitted its indebtedness to the Plaintiff and that the 2nd and 4th Defendant having guaranteed the 1st Defendant's indebtedness are liable.

30. The Plaintiff has prayed for the principal amount, interest at 14% per annum, together with fees of 2% per amount paid out and a further 2% interest per month. While the principal interest is clearly provided for in the Facility Agreement, it is not clear what the amount paid out is and the basis of the 2% interest per month. This is an issue that should proceed for trial.

31. Otherwise and for the reasons I have set out above, the Plaintiff's Notice of Motion dated 14th December 2020 succeeds on the following terms:

> *(a) Judgment be and is hereby entered for the Plaintiff against the 1st, 2nd and 4th Defendants jointly and severally for the sum of USD 1,073,639. 12 with interest at 14% per annum from 31st July 2020.*
>
> *(b) The balance of the claim for fees claimed and additional interest shall proceed to trial.*
>
> *(c) The Plaintiff shall have costs of the application.*

DATED and **DELIVERED** at **NAIROBI** this **30th day of APRIL 2021.**

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Ogunde instructed by Walker Kontos Advocates for the Plaintiff

Mr Esmail instructed by Anjarwalla and Khanna LLP for the 1st and 2nd Defendants.

No appearance for the 3rd Defendant.

Mr Kimani, SC with him Mr Tugee instructed by Hamilton, Harrison and Mathews Company Advocates for the 4th Defendant.