REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCC NO. E383 OF 2020

KENRUSS MEDICS LIMITED.....1ST PLAINTIFF

GALINA KRUMKACHEVA.....2ND PLAINTIFF

VERSUS

PASAIBA TOURMALINE LIMITED.....1ST DEFENDANT

IRENE CHEMUTAI.....2ND DEFENDANT

R U L I N G

1. Before me is the plaintiffs' application dated 26/10/2020. The same was brought under ***Order 36 Rule 1 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act.***

2. The same sought orders that summary judgment be entered in favour of the plaintiffs as prayed for in the plaint. It was supported by the affidavit of **Galina Krumkacheva** sworn on 26/10/2020.

3. It was contended by the plaintiffs that the defendants had numerously acknowledged being indebted to the plaintiffs but had failed to settle the debt. That the defendants were indebted to the plaintiffs and had no valid defense to warrant the suit proceeding to full trial.

4. The defendants opposed the application vide an affidavit by **Amos Kipkoech Mongony,** sworn on 18/11/2020. They contended that they had filed a defence which raised questions of law and fact which needed to be heard. That they also had a claim against the plaintiffs as captured in the set-off. That their right to be heard should not be curtailed.

5. They denied acknowledging the debt and averred that the documents relied on by the plaintiffs only acknowledged service. They also challenged the authenticity of some signatures in the documents relied on by the plaintiffs on the ground that they were superimposed.

6. The parties filed their respective submissions dated 6th and 9/3/2021, respectively. I have carefully considered the affidavits and respective submissions on record.

7. The sole issue for determination is whether the plaintiffs' prayer for summary judgment is merited. The application was grounded upon the contention that the defendants had no valid or plausible defence to the plaintiffs' claim.

8. In **Postal Corporation of Kenya vs Inamdar & 2 Others [2014] Eklr,** the Court of Appeal delivered itself thus: -

> ***"However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court's decision in the case of Continental Butchery Limited vs. Samson Musila Ndura, Civil Appeal No. 35 of 1997 where this Court stated:***
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> *'With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their*

property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend.

If a bona fide triable issue is raised the Defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham'".

9. This was reiterated by that Court in **Moi University vs Vishva Builders Limited CA No. 296 of 2004** (unreported) wherein it was held that: -

"The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs. 185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see HD Hasmani v. Banque Du Congo Belge (1938) 5 E.ACA 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said: -6

*'In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication'***".**

10. In the present case, the plaintiffs' case is that they advanced monies to the defendants which the latter have acknowledged. That the defendants have no valid or plausible defence to warrant the suit to go for full trial. That since the defendants had acknowledged their indebtedness, they have no plausible defence.

11. On the other hand, the defendants denied the plaintiffs' claim. They admitted the loan agreement with the plaintiffs but they contended that it was contrary to statute. That the plaintiffs are not licenced institutions permitted by law to do the business of lending on interest or issuing performance bonds. That it is against public policy for individuals to engage in the lending business.

12. It was also the defendants' contention that the agreement dated 19/4/2018 was unconscionable and oppressive in that the guaranteed sums were only performance bond and not repayable. The contract was based on past consideration and the rate of interest applied was contrary to ***section 33B of the Banking Act.*** There were also contentions that the monies based on the promissory note had been repaid in full.

13. From the foregoing, while it is clear that the existence of the loan agreement is not denied, its validity has been challenged on a point of law. Can an unlicensed individual or institution deal in the business of lending and charging interest and penalties like a bank? Such institutions or individuals being unregulated, can they legally operate outside regulated regime of the banking sector? Can the plaintiffs claim the amounts given as performance bond yet the same was never advanced to the defendants but was only security?

14. The plaintiffs contended quite correctly, that vide the holding in **National Bank of Kenya Ltd v. Pipelastic Samkolit (K) Ltd [2001] Eklr,** that it is not in the business of the Court to rewrite agreements entered into by parties, even if the same are horrendously bad deals to one of the parties. That is the correct position of the law, but if a contract is said to be contrary to the law, the Court is entitled to re-look at it.

15. The contentions by the defendants are that; the agreement entered into is contrary to law, the monies claimed are unrecoverable, the contract is based on past consideration, amongst other claims.

16. The view the Court takes is that, those claims are not flimsy. They are triable. The Court cannot shut out its eyes from the defence on record, however irregularly filed. It raises triable issues that cannot just be wished away. They require to be tested at a trial.

17. In this regard, I find that the application lacks merit and I hereby dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF AUGUST, 2021.

A. MABEYA, FCI Arb

JUDGE