



**Sunfunder Inc & another v Astonfield Solesa Solar Kenya Limited (Civil Case E205 of 2021)
[2021] KEHC 397 (KLR) (Commercial and Tax) (22 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E205 OF 2021
DAS MAJANJA, J
DECEMBER 22, 2021**

BETWEEN

SUNFUNDER INC 1ST PLAINTIFF

BEYOND THE GRID SOLAR FUND INC LLC 2ND PLAINTIFF

AND

ASTONFIELD SOLESA SOLAR KENYA LIMITED DEFENDANT

RULING

1. Before the court is a Notice of Motion dated 26th July 2021 made, inter alia, under Order 2 Rule 15 of the *Civil Procedure Rules, 2010* (“the Rules”) where the Plaintiffs seeks an order that the Defendant’s statement of defence be struck out for failing to disclose any reasonable defence and otherwise being vexatious and that judgment be entered against the Defendant as prayed for in the Plaint together with costs and interest accruing thereon. The application is supported by the affidavit of the 1st Plaintiff’s Head of Finance, Samuel Malaki, sworn on 26th July 2021. It is opposed by the Defendant through the replying affidavit of its director, Ameet Lalchand Shah, sworn on 17th September 2021. In addition to their depositions, the parties have also filed written submissions in support of their respective positions.
2. From the Plaint and the parties’ depositions, the facts giving rise to this application are common ground. The Plaintiffs are corporations incorporated and duly existing under the laws of the State of Delaware in the United States of America whereas the Defendant is a private limited liability company duly incorporated in Kenya. The 1st Plaintiff, in its capacity as an Arranger/ Facility Agent/ Security Trustee entered into a Loan Agreement with the Defendant dated 12th May 2017 (“the Loan Agreement”) to which the 2nd Plaintiff as the lender advanced a term loan facility up to the principal sum of USD 2,500,000.00 to the Defendant on the terms set out in the Loan Agreement. The Plaintiffs aver that the Defendant has since breached the terms of the Loan Agreement by failing to make



payments of the required installments as more particularly set out at section 2.4 of the Loan Agreement and the 1st Plaintiff by the letter dated 15th May 2018 notified the Defendant of the said default and called for payment of the outstanding arrears.

3. The Plaintiffs contend that the Defendant failed to comply with the notice and persisted in the breach prompting the 1st Plaintiff to instruct its appointed advocates to commence the process of recovery of the total amount outstanding which stood at USD 3,384,927.73 as at 21st September 2020 when their advocates issued a demand.
4. When the Defendant failed to honour the demand, the Plaintiffs filed this suit on 22nd April 2021 and now seek judgment against the Defendant for the sum of USD 3,584,563.86 due as at 7th April 2021, interest and default penalty on this amount at the contractual rates until the date of payment in full, costs of the suit and interest.
5. In response to the suit, the Defendant filed a Statement of Defence on 4th June 2021 which is the subject of this application, to which I now turn.

The Application

6. The Plaintiffs' case is that the Defendant's Statement of Defence does not dispute the advanced loan and does not raise any reasonable grounds of defence that would warrant consideration by Court and is thus vexatious and only meant to delay the course of justice. The Plaintiffs state that Article I of the Loan Agreement provides for the Maturity Date being the 31st March 2019 and that pursuant to the said date, Article 2.04 set out the date and amounts payable with the last payment being due and payable on the foretasted date and that section 2.03 of Article II equally made provision for the rate of interest payable.
7. The Plaintiffs aver that the Defendant having pleaded that it received the said loan amount, has not demonstrated that it has repaid the same or at all but that in its defence pleaded that the amounts are not due as yet. The Plaintiffs aver that in order to justify non-payment, the Defendant has specifically pleaded three main grounds which do not raise any valid or reasonable defence; the introduction of the interest rate cap, the Covid 19 pandemic and the electioneering period.
8. The Defendant states that the interest rate cap introduced by an amendment to the *Banking Act* (Chapter 488 of the Laws of Kenya) took effect in September 2016 which was before the parties entered into the Loan Agreement and the parties thus were fully aware of the legal position regarding interest rates. Further, that the interest rate cap did not do away with lending and cannot be a material adverse action as other business entities were still able to secure financing and transact business hence the Defendant cannot blame its inability to secure its obligations on the ability by its Clients to secure financing. The Plaintiffs also hold that the repayment of the facility was not subject to any third-party transactions or any occurrences affecting any third parties with whom the Defendant may have opted to transact with as its obligation was to repay the loan amounts when they fell due.
9. On the Covid-19 pandemic, the Plaintiffs submit that the loan facility matured way before the onset of the pandemic and that the Defendant was in breach as at 31st March 2019. That the Defendant is well aware that even the moratorium by the CBK arising from the Presidential Address of March 2020 was clear that the same only applied to facilities that were up to date as at then.
10. On the electioneering period, Plaintiffs submit that the Defendant has not pleaded how the electioneering process prohibited it from discharging its obligations yet other businesses continued to operate. It adds that the Defendant has not demonstrated why it is yet to discharge its obligations



several years after the elections. The Plaintiffs also deny the Defendant's claim that there was an insurance that was taken out to cover the highlighted risks as none has been annexed by the Defendant.

11. The Plaintiffs further aver that in discussions with the Defendant on proposals of a payment plan, the Defendant has never raised the above issues as it is aware that they are inapplicable and are but an afterthought shore up its defence to the claim. They urge the court to strike out the defence.

The Defendant's Reply

12. The Defendant opposes the application and submits that the application to strike out its Defence is an oversimplification of the issues at hand and a misrepresentation of the facts before the court. The Defendant avers that the Plaintiffs have failed to appreciate that the Loan Agreement had set out clearly that Material Adverse effects had a bearing on the repayment of the working capital that is alleged to have been advanced and the repayment terms, are in the instance of any Material Adverse effect, altered and for this court to determine if at all there were any material adverse effects, the court is duty bound to review the evidence on record and not just to determine the suit at a preliminary stage.
13. The Defendant depones that material adverse effects are matters of fact that go to the root of the Loan Agreement that must be considered by the court and further be analyzed by a review of the evidence presented by the Defendant and for this court to determine the matter fairly, the court must consider the defense and the evidence that has been put forward and also the terms of the Loan Agreement that are in place and the interpretation of the said terms.
14. The Defendant asserts that the funds are not due nor are they payable as demanded and according to its defence, the facility was duly insured and the premium paid, thus the Plaintiffs' advance was fully covered in case of Material Adverse effects raised in the Defence.
15. The Defendant states that the decision by a court to strike out a defense must be done with caution and carefully due to the adverse effects that the same exposes the Defendant to, which in this case is north of USD 3,000,000.00 which is a colossal amount for any business. The Defendant avers that its Defence has raised two key issues; first, being that the Loan Agreement foresaw a situation whereby a material adverse effect may occur and hamper either party from performing its obligation. Second, that there exists an insurance policy taken out in favour of the Plaintiffs with regard to this risk of material adverse effect of occurring. Therefore, the Defendant advances that these are both matters of fact and law that must be ventilated, prior to any decision being taken to strike out the defence as prayed in the application.
16. The Defendant beseeches the court to allow it a chance to be heard before condemning it to pay sums that are neither due nor owing as the Defense does raise triable issues that this court should consider at a hearing and not condemn the Defendant unheard. The Defendant further faults the Plaintiff for annexing letters sent on a without prejudice basis in support of their application which is contrary to the legal position on "without prejudice" communication.

Analysis and Determination



17. From the pleadings and submissions, the main issue for determination is whether the Defendant's Defence ought to be struck out. It is common ground that the court's discretion to strike out a pleading is grounded under Order 2 Rule 15 of the Rules which provides as follows:

15. At any stage of the proceedings the court may order to be struck out or
(1) amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.

18. The Defendant relies on several decisions including *D.T. Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1 where the Court of Appeal expressed the principle as follows:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

19. I agree with the above statement of law and add that a Defence should only be struck out where if it does not disclose a semblance of a Defence or raise any fundamental issue or is incurable by amendment. Further, a pleading should only be struck in plain and obvious cases that do not require evidence to disprove what either party says. However, as the court held in *Kenya Commercial Bank v Suntra Investment Bank Ltd* ML HCCC No. 380 of 2013 [2015] eKLR a balance must be struck between the principles and discretion of striking out a pleading and the policy consideration that a Plaintiff should not be kept away from his judgment by an unscrupulous Defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case.

20. I have considered the Plaintiff's claim and the Defendant's Defence and I find and hold that the Defence does not raise any triable issue or semblance of a defence and is made up of mere and general denials with averments that are approbating and reprobating. The fundamental issue is that the parties entered into the Loan Agreement, a fact that is not denied. Further, it was advanced money which was due on or before 31st March 2019.

21. The Defendant, on one hand, denies the loan facility but immediately avers that the amount is not due. It admits indebtedness but denies that it is not liable to pay the debt. Its Statement of Defence rests mainly on certain material adverse events and force majeure as a basis of avoiding liability under



the Loan Agreement. Article 1 section 1.01 thereof states, “Material Adverse Effect” means a material adverse effect on business, assets, or financial condition of any member of the Group or the Group as a whole, the ability of the Borrower to perform its obligations under any Financing Document, the validity or enforceability of any Financing Document, or any right or remedy of a Finance Party in respect of a Financing Document.”

22. I am in agreement with the Plaintiff that the Defendant’s averments are an afterthought and do not in any way diminish the Defendant indebtedness to the Plaintiffs or in any way absolve the Defendant from its obligation under the Loan Agreement. The issues of the interest rate caps enacted in 2016 and the 2017 elections were already known and in the contemplation of the parties when they entered into the Loan Agreement on 12th May 2017 they could have material adverse effect as contemplated by the parties. Under the Loan Agreement, the debt was due on 31st March 2019 which is before the COVID-19 pandemic struck and was declared in March 2020. I therefore agree with the Plaintiffs’ submissions on this score and hold that the facts pleaded by the Defendant do not raise any triable issues.
23. A party who relies on the defence of Force Majeure to avoid its contractual obligation must specifically plead the events it relies on. This is the requirement of Order 2 rule 4 of the Civil Procedure Rules which provides that, “A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality.” In addition, I would only reiterate what the court in *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* ML HC COMM No. 162 of 2014 [2017] eKLR stated that:
102. As a general rule, a party pleading force majeure must prove that the failure was due to an impediment beyond his control; and that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform the contract into account at the time of the conclusion of the contract; and that he could not reasonably have avoided or overcome it or at least its effects.
24. I have looked at the defence and whereas the Defendant pleads that, “various external aspects that have occurred in the Kenyan Economy have led to a force majeure event”, it does not state or plead what these events are. Neither does it plead what the “material adverse effects” are to enable it avoid liability. While I agree with the Defendant that the court should eschew consideration of the evidence, the courts inquiry in this case proceeds from what it pleaded in the Statement of Defence and in my view, the Statement of Defence falls far short of what is required to go forward to trial.
25. The Defendant has pleaded that it should be absolved from liability to pay the debt as the 2nd Plaintiff took out a Trade Credit Insurance for which the Defendant paid premiums. I find that there is nothing in the Loan Agreement that discharges the Defendants from liability to pay the loan on account of insurance taken by the Plaintiffs to insure itself against the risk of non-payment by the Defendant. I hold that the issue of insurance is a matter between the Plaintiffs and their insurers and not the Defendant and Plaintiffs.
26. The Plaintiffs have relied on correspondence between the parties which they submit, proves that the Defendant admits the debt. The Defendant has challenged these letters by stating that the same were written on a ‘without prejudice’ basis and cannot be relied on. While this is correct, letters written on a ‘without prejudice’ basis are not however entirely inadmissible as submitted by the Defendant. The proper position is that contents of communication made “without prejudice” are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and to prove the fact that such communications and or



negotiations took place (see *Halsbury's Laws of England* Vol 17 at para. 213 and *Coretec Systems & Solutions Ltd v Digital Divide Data Kenya Ltd* ML HC Misc. Civil Application No. E052 of 2018 [2020] eKLR).

27. The correspondence between the parties show that negotiations took place with the Defendant making an offer for a payment plan through its counsel's letter dated 9th November 2020. This was not accepted by the Plaintiffs' counsel's letter dated 19th November 2020 who demanded new conditions which were never confirmed by the Defendant. In my view, there was no binding agreement hence the contents of the 'without prejudice' letters are inadmissible to show or demonstrate any admission of indebtedness. Nevertheless, the letters show that demand of the debt was made and that no payment was forthcoming thereafter leading the Plaintiffs to file suit.
28. At the end of the day, I find that the issues raised in the defence are hopeless, do not raise any substantive triable issue or reasonable ground of defence. The fact of the Loan Agreement is not disputed, the date for repayment of the loan under the Agreement was on 31st March 2019 and payment has not been made to date. The issues raised by the Defendant in defence are illusionary and moonshine and do not deserve to go to trial.

Disposition

29. I allow the Plaintiffs' application dated 26th July 2021 and order as follows:
1. The Defendant's Statement of Defence dated 30th May 2021 be and is hereby struck out and judgment be and is hereby entered for the Plaintiffs and as the against the Defendant for:
 - a. The sum of USD 3,584,563.86 together with interest at 10.75% p.a from the date of filing suit until payment in full.
 2. The Defendant shall bear the cost of the application and the suit.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Maondo instructed by Mulanya and Maondo Advocates for the Plaintiffs

Mr Rutere instructed by R. K. Associates Advocates for the Defendants.

