



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 324 OF 2018

MIDDLE EAST BANK KENYA LTD.....PLAINTIFF/RESPONDENT

VERSUS

FARID ABDULRAZAK SHEIKH.....DEFENDANT/APPLICANT

RULING

BACKGROUND

The Plaintiff filed suit on 18th August, 2018 against the Defendant for enforcement of a guarantee of **Ksh 180,000,000/-** on behalf of Arboretum Plaza Limited (APL) indebtedness.

The Defendant filed Defence on 2nd October 2018 and contested the debt of **Ksh 404,772,594.11** by the Company and whether the charged **suit property LR 209/8619** had been sold to realise the debt.

The Plaintiff filed Notice of Motion on 25th October 2018 for summary judgment against the Defendant for the guaranteed sum.

The Defendant filed Grounds of Opposition on 31st October 2018 on the same grounds as those raised by the Defence.

On 1st April 2019, by consent the Plaintiff withdrew the Application for summary judgment so as to proceed with the hearing of the suit.

The parties were to attend case management proceedings, the Defendant failed to attend or participate as confirmed by the Court record.

APPLICATION TO STRIKE OUT THE PLAINT/SUIT

The Defendant instead filed an application vide Notice of Motion of 4th October 2019 brought under **Order 2 Rule 15(2) (b) & (c) & (d) Civil Procedure Rules 2010** seeking to strike off the suit. The Defendant /Applicant sought the Plaintiff filed on 13th August 2018 to be struck off as it lacks a justifiable cause of action against the Defendant, it does not set out particulars for breach of contract alleged and does not disclose material facts relevant to these proceedings.

The Court directed that the instant application would be disposed of first before hearing and determination of the main suit.

The Plaintiff/Respondent filed written submissions on 3rd October 2019 and the Defendant/Applicant filed written submissions on 27th November 2019. The parties through the respective Counsel submitted by highlighting the submissions filed on 28th November 2019.

DETERMINATION

The issue for determination is whether there is a competent suit for hearing and determination.

This Court considered the submissions; the Defendant relied on **Order 2 Rule 15 CPR 2010 & Order VI Rule 13(1) CPR 2010 to buttress the grounds for striking out pleadings.**

In the case of ***Cohen –Breen vs Gray Tel Grp Inc 661 F. Supp 2d 1158, 1171 (D .Nev.2009)*** where it was observed that ;

“A claim for breach of contract requires the Plaintiff to demonstrate the following elements; (1) the existence of a valid contract; (2) a breach by the Defendant ; and (3) damages as a result of the breach.”

In DT Dobie & Co Ltd vs Muchina (1980) eKLR;

“A cause of action will not be considered reasonable if it does not state such facts as to support the claim and prayer.”

In Investments & Mortgages Bank Ltd vs Nancy Thumari & 3 Others [2015] eKLR which considered VK Construction Company Limited vs Mpata Investments Ltd HCC 257 of 2003 which considered;

“A reasonable cause of action is such a factual situation as would entitle a person to obtain a remedy against another person and which has some chance of success.”

The Defendant/Applicant at paragraph 16 of the written submissions raised issues that were alleged to have vitiated a competent suit before Court as follows;

- a) Paragraph 4 of the Plaintiff which the Plaintiff alludes to diverse financial facilities; it is impossible to decipher which among the diverse facilities the Defendant issued a guarantee on and which facilities the Company is in breach of;
- b) Paragraph 5 of the Plaintiff does not reveal how the amount of Ksh 404,772,594.11 was arrived at and when the default occurred; When the demand to the Principal debtor was made and when the cause of action materialized; against the Defendant.
- c) Paragraph 6 of the Plaintiff, the Plaintiff claimed the Defendant agreed to guarantee repayment of monies and liabilities but failed to set out the Clause of the Contract that provides for this; it is impossible to know when the demand was made by the plaintiff; The Plaintiff is silent as to whether the Guarantee was issued in respect of one of diverse facilities or all of them.

The Plaintiff/Respondent submitted that in reliance on the same case; **DT Dobie & Company (Ky) Ltd vs Muchina [1982] eKLR referred to in Commodity House Ltd vs Simba Merchandising Co (K) Ltd & Anor [2013] eKLR** it was observed;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment.”

The Plaintiff at paragraph 18 of written submissions clarified that the

- a) Existence of the contract is at paragraph 4 of the Plaintiff. The contract was/is between the principal debtor company and the Plaintiff with the Defendant as guarantor. The defendant admits this fact in the Defence.
- b) Defendant’s obligation to the Plaintiff with regard to the principal debtor’s liability is outlined in paragraph 6 of the plaintiff. The Defendant admits this fact in the Defence.
- c) Defendant’s liability arising from the Principal Debtor’s liability is outlined in paragraph 7 of the Plaintiff. The Defendant joined issue and put the Plaintiff on strict proof thereof.

The Practice Directions relating to Case Management process in Commercial & Admiralty/Tax Division are housed in Gazette Notice No. 5179 and are mandatorily applicable in all suits commenced by Plaintiff, Petition or Originating Summons within the Division as was held in **Nicholas Kiptoo Salat arap Korir vs IEBC & 7 Others[2013] eKLR.**

The Plaintiff /Respondent contended that contrary to Direction 6 of the Practice Directions, contrary to Court order and Court record, the Defendant Applicant failed despite service to attend/participate in case management proceedings. The Defendant/Applicant failed to file relevant documents in compliance with Case Management Conference nor filed a Case Management Request as required indicating orders/directions sought in the instant application.

The Plaintiff/Respondent asserted that the Defendant through respective Counsel has through the proceedings and instant application acted contrary to the Overriding Objective housed by **Article 159 COK 2010 and Section 1 1A & 3 of the CPA.** The Plaintiff/Respondent sought the matter be heard and determined on merit.

After consideration of the above submissions this Court finds as follows;

- 1) In **Principles of Commercial Law** by Kibaya Imaana Laibuta; Pg 228 Chapter 8 on **Guarantee & Indemnity** a guarantee is defined as follows;

“A special promise or undertaking constituted by a collateral agreement in which a person (called a guarantor) is held liable for the debt, default or miscarriage of another (called the principal debtor) who is primarily liable for the subject debt. The special promise need not be in any particular form...”

Therefore, in application of the definition above to the statement of claim by the Plaintiff/Respondent in the Plaintiff paragraphs 4,5,6 & 7 it

constitutes a reasonable cause of action [which if proved] against the Defendant gives the Plaintiff right to claim redress for any loss, damage or injury arising from breach of contract.

The Court of Appeal in *City Council of Nairobi vs Wilfred Kamau Githua T/A Githua Associates & Anor [2016] eKLR* made reference to privity and/or enforcement of contracts. In regard to the collateral agreement, *Halsbury's Laws of England 4th Edn Vol 9 (1) para 748* with regard to privity of contract provides;

“The doctrine of privity of contract is that, as a general rule, at Common Law a contract cannot confer rights or impose on impose obligations on strangers to it; that is persons who are not parties to it. The parties to a contract are those persons who reach agreement and whilst it may be clear in a simple case who the parties are, it may not be so obvious where there are several contracts, collateral contracts, irrevocable credits, contracts made on the basis of the memorandum and articles of a company, collective agreements, contracts with an incorporated association and mortgage surveys and valuations.”

The issues arising from the claim by the Plaintiff against the Defendant in the Plaint constitute a course of action arising from underlying contract, shall be determined upon hearing and determination of the suit. If there was no reasonable claim as alleged by the Defendant, the Defendant ought to have raised these issues in the Defence filed on 22nd October 2018 or reserved the right to raise them at the earliest opportunity as preliminary objection before the hearing and/or Case management process.

The instant application amounts to an application for further and better particulars of the claim which would have appropriately been canvassed during case management. The Applicant may also apply/request for notice to produce documents or to examine director(s) etc. If the collateral guarantee agreement and the statement(s) of account are required to prove the principal debtor's indebtedness and hence bind the guarantor are not produced when sought and/or not proved by any other relevant documents, then the Defendant's Defence may carry the day. This right is still open and available to the Defendant/Applicant as they are bound by the Practice Rules to adhere to and participate in Case Management process. It is on record, that the Defendant was accorded the opportunity to attend and/or participate in case management proceedings and failed to do so. It is also on record that the parties through Counsel agreed by Consent to withdraw the Plaintiff's application for summary judgment and proceed for case management to expedite hearing of the main suit. The Defendant failed to comply/cooperate and instead filed the instant application. On its merit the application was/is premature in light of ongoing case management process sanctioned by Practice Directions that bind all parties.

DISPOSITION

- 1. For reasons explained above there is a reasonable cause of action that should be heard and determined on merit.**
- 2. The Defendant's/Applicant's application of 11th September 2019 is dismissed with costs to the Plaintiff/Respondent.**
- 3. After the current global pandemic that necessitated the Court system to lockdown from 16th March 2020; on resumption of normalcy upon official announcement parties/Counsel to take a hearing date from the Registry for hearing of the main suit.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 27TH MARCH 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MS TRIPLEOKLAW ADVOCATES FOR THE APPLICANT

MS MOKAYA & ONYAMBU ADVOCATES FOR THE RESPONDENT