



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E259 OF 2019

BETWEEN

GULF AFRICA BANK LIMITED.....PLAINTIFF

AND

EDEN HOMES LIMITED.....1ST DEFENDANT

IAN GERSHOM MARANGA.....2ND DEFENDANT

LAWRENCE KANJA MATU.....3RD DEFENDANT

CHRISTINE WAIRIMU MATU.....4TH DEFENDANT

RULING

Introduction

1. In its plaint, the plaintiff (“the Bank”) seeks judgment for Kshs. 20,825,701.45 together with profits thereon at the Plaintiff’s commercial rate of 13% per annum from 22nd July 2019 plus default damages at 20% until payment in full. It also seeks judgment against the 2nd, 3rd and 4th Defendants jointly and severally for Kshs. 20,825,701.45 together with profits thereon at the Plaintiff’s commercial rate of 13% per annum from 22nd July 2019 plus default damages at 20% until payment in full. The Bank also prays for costs of the suit and profit thereon at court rates until payment in full.

2. The Bank has filed a Notice of Motion dated 14th January 2020 seeking an order that the defendants’ statement of defence be struck out and judgment be entered for the Bank against the Defendants’ jointly and severally as prayed in the plaint.

3. The application was supported by the affidavit and further affidavit of Lawi Sato, the Bank’s Legal Officer, sworn on 14th January 2020 and 4th February 2020. The Defendants did not file any replying affidavits but relied on a Notice of Preliminary Objection dated 3rd February.

4. The grounds of the preliminary objection were that the application offended the mandatory provisions of **Order 19** of the **Civil Procedure Rules** and that the affidavit in support of the application offended the provisions of the **Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)** as no exhibits and annexures were exhibited and that the plaintiff could not rely on them.

5. In order to cure the preliminary objection, the Bank filed the further affidavit which contained all the exhibits relied on in order to support the application. The application came up for hearing several times and I directed counsel for the Bank to serve the respondents. They did not file any replying affidavit, written submissions or attend court for hearing. The application was therefore unopposed. That notwithstanding, the Defendant’s filed a defence which the court has to consider in order to satisfy itself that the Bank’s case has merit.

Plaintiff’s Claim

6. The Bank’s case is set out in the plaint and supported by documents annexed to the affidavit in support of the Notice of Motion.

7. On 7th June 2018, the Bank extended to the 1st Defendant (“the Company”), a Local Purchase Order (LPO) facility known as a Tawarruq Finance facility for a maximum principal sum of Kshs. 20,000,000.00 to finance a contract from the Kenya Urban Roads Authority (“KURA”). The facilities were secured the directors joint and several guarantees for Kshs. 20,000,000.00 and a letter of set off by the Company. In that regard, the 2nd, 3rd and 4th Defendants as directors of the Company executed a guarantee dated 8th June 2018 while the Company executed a letter of set-off dated 8th June 2018.

8. On 12th June 2018, the Company gave an irrevocable undertaking to channel its trading income proceeds through an account with the Bank. By a letter dated 12th June 2018, KURA confirmed that it had awarded the Company a contract for Ngong Road Sewer and Water Relocation Works and undertook to channel all monies due to the Company through its account with the Bank.

9. Following negotiation between the Company and the Bank, the Bank did issue a letter dated 27th March 2019, restructuring the banking facilities. The Defendants however did not repay the debt as undertaken despite the Bank directly and through its advocates issuing demand letters dated 17th January 2019, 30th January 2019, 10th February 2019 and 25th July 2019.

The Defendants’ defence

10. The Defendants filed a statement of defence dated 14th October 2019. They admitted the Banking facilities but averred that the Company did not provide a security; LR No. KILIFI/KADZODZO/MADZIMBANI/645 registered in the name of Kitsao Kahindi Ngowa. The Defendants further contended that the terms of the restructured facility were not perfected hence the suit was filed prematurely as the Bank did not issue the documents to be executed including a Board resolution by the Company, facility agreements, personal guarantees and the letters of set-off. They contended that since the Bank was in breach, it could not file this suit.

11. The Defendants averred that the Bank has not come to court with clean hand as the accounts furnished by the court do not reflect a payment of Kshs. 2,000,000.00 which the Company paid and the damages amounting to Kshs. 585,032.84 on account of default damages were not provided for at all.

12. The 2nd, 3rd and 4th Defendants also contended that they are not liable under the guarantee executed by them on 8th June 2018 on the ground that by dint of the restructured facility dated 27th March 2019, their liability was extinguished as the Bank required fresh guarantees and indemnities to be executed.

The Submissions

13. **Order 2 rule 15** of the *Civil Procedure Rules* empowers the court to strike out a statement of defence on the following terms;

15.(1) At any stage of the proceedings the court may order to be struck out or 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. [Emphasis mine].

14. The principles upon which the court exercises this drastic power are well settled. The court will not strike out a defence if it raises a triable issue (see *D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another NRB CA Civil Appeal No. 37 of 1978 [1980] eKLR*). It has also been held that in an action for a debt, a mere or general denial was an insufficient defence (see *Magunga General Stores v Pepco Distributors Limited [1986] LLR 4111 (CAK)* and *Raghibir Singh Chatte v National Bank of Kenya Limited [1996] eKLR*). In *Raghibir Singh Chatte v National Bank of Kenya Limited [1996] eKLR* where Platt JA., stated that:

First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment has been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given.

15. The Bank’s case is that the Defendants’ statement of defence, when considered in light of the uncontested documents it has presented, does not raise any triable issue. It adds that the Defendants do not dispute the banking facilities or the debt. It takes the position that the statement of defence should be struck out as it does not raise a reasonable defence, contains mere denials and is an attempt to delay a fair trial of the suit.

Determination

16. Despite being afforded the opportunity, the Defendants did not contest the documents produced by the Bank nor rebut the averments in the deposition sworn by Mr Sato. The documents confirm that the Bank advanced money to the Company which was guaranteed by the 2nd, 3rd and 4th Defendants. The Letter of Restructure amounted to an acknowledgement of the debt and an offer to restructure the debt on terms set out therein. There is no evidence that the Defendants re-paid the debt due to the Bank as the statements of account produced by the Bank establish affirmatively that money was advanced to the Company.

17. The Defendant raised the issue that the security which was part of the restructured facility was never provided but in response Mr Sato explained that the registered owner of the property informed the Bank that he had not consented to the property being used as a security hence it was never charged. In this case, it was the Company that was under an obligation to provide an appropriate security and it failed to do so. Mr Sato also deponed that the Company accepted the terms of the restructured facilities by an email dated 1st April 2020 and was therefore liable.

18. The 2nd, 3rd and 4th Defendants' defence that their liability was extinguished by the subsequent agreement to restructure the facilities ignores the reality that under Clauses 1 and 2 of the Guarantee and Indemnity dated 8th June 2019, it was a continuing security to secure the ultimate balance owed to the Bank by the Company. I agree with the submission by counsel for the Bank that a restructured facility is not a new facility which required fresh guarantees.

19. In light of the positive case put forth by the Bank, I find that the statement of defence does not raise any triable issue in so far as the Defendants' indebtedness is concerned. *It is scandalous, frivolous and vexatious and may prejudice, embarrass or delay the fair trial of the action.* A full trial would add nothing to the defence as the documents produced by the Bank speak for themselves.

20. The liability of the 2nd, 3rd and 4th Defendants is limited to Kshs. 20,000,000 as a result of the guarantee.

Disposition

21. Consequently, I allow the Notice of Motion dated 14th November 2019 on terms that judgment be and is hereby entered for the Plaintiff against the Defendants jointly and severally as follows:

- (a) Kshs. 20,825,701.45 save that the 2nd, 3rd and 4th Defendants who shall be liable to the extent of Kshs. 20,000,000.00 only.
- (b) The amount shall accrue interest at 13% per annum from 22nd July 2019 until payment in full.
- (c) The Defendants shall bear costs of the application and the suit.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF AUGUST 2020.

D. S. MAJANJA

JUDGE

Mr Kigata instructed by Wamae and Allen Advocates for the plaintiff.

No appearance by Thuita Kiiru and Company Advocates for the defendants.