REPUBLIC OF KENYA

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

Introduction and Background

1. The Plaintiff is a company incorporated in the Cayman Islands and invests in collateralized, short dated trade finance transactions. It commenced this suit by the Plaint dated 18th August 2020. Its case is that by a Facility Agreement dated 26th September 2019 ("the Facility Agreement"), it agreed to lend to the 1st Defendant 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.

2. 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 1st Defendant. 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 1st Defendant to the Plaintiff, both actual and contingent and whether incurred solely or jointly and as principle or surety or in any other capacity.

3. 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 1st Defendant 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.

4. 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.

The Application

5. Together with the Plaint, the Plaintiff filed a Notice of Motion Application dated 18th August 2020 made, inter alia, under **Order 39 rules, 1, 2, 5 6** and **7** of the ***Civil Procedure Rules*** ("the ***Rules***") seeking the following orders:

> *1. [Spent]*
>
> *2. This Honourable Court be pleased to issue a warrant of arrest against the 2nd Defendant/Respondent to be arrested and brought before the Court to show cause as to why he should not furnish security for his appearance for this suit*
>
> *3. Upon the 2nd Defendant/Respondent's default and/or failure to show cause the Honourable Court be pleased to order the 2nd Defendant/Respondent to deposit in Court money or other property as security herein to satisfy any Decree that may be passed against him*
>
> *4. That the Honourable Court be pleased to direct the time limit within which the 2nd Defendant/Respondent ought to comply with its orders, in default of which this Honourable Court to order the arrest and commital to prison of the 2nd Defendant/Respondent until this suit is determined or any Decree passed against the Defendant/Respondent is satisfied*
>
> *5. The Honourable Court be pleased to order the Officer-in-Charge of the Police Division within Parklands/Westlands Area, Nairobi to assist in the execution of the arrest of the 2nd Defendant/Respondent*
>
> *6. The Honourable Court be pleased to order the 2nd Defendant/Respondent to deposit his passport in Court pending the hearing and determination of this suit*
>
> *7. Summary Judgment be entered against the Defendants as prayed in the Plaint*
>
> *8. Costs of this application be provided for*

6. The Application is supported by the affidavits of Duncan Potts, a Senior Deal Advisor of the Plaintiff, sworn on 18th August 2020 and 3rd September 2020 respectively. It is opposed by the 1st and 2nd Defendants through a replying affidavit sworn on 8th September 2020 by the 2nd Defendant who is a director of the 1st Defendant. The 1st and 2nd Defendants filed a Notice of Preliminary Objection dated 8th September 2020. The 4th Defendant relies on his affidavit sworn on 21st September 2020 and Grounds of Opposition dated 22nd September 2020. The 3rd Defendant has not filed any documents in the matter.

7. The parties filed written submissions in support of their respective positions. The issues for determination from the face of the application, depositions and submissions are three-fold and I shall proceed to deal with them accordingly:

> (a) Whether the application is fatally defective.
>
> (b) Whether the Plaintiff has satisfied the conditions for granting an order of attachment under **Order 36** of the ***Rules***.
>
> (b) Whether the Plaintiff has established a case for summary judgment against the Defendants.

Whether application is fatally defective

8. The 1st and 2nd Defendants resist the application on the ground that **Order 36** and **Order 39** are mutually exclusive as **Order 36** of the ***Rules*** seeks execution before judgment on one hand while a party is seeking summary judgment and if successful, the Plaintiff would proceed to execution. They contend that it was improper for the Plaintiff to make an 'omnibus' application with ambiguous prayers, hoping that the Court will grant at least some. They relied on ***Rajput v Barclays Bank of Kenya Ltd & 3 Others*** **[2004] 2 KLR 393, 407** where Emukule J., expressed the following view:

> *There is no doubt the application is an all-cure omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out.*

9. I hold that there is no rule of law or procedure that prohibits a party from seeking several reliefs under different provisions of the ***Rules***. As the court observed in ***Rajput v Barclays Bank of Kenya*** **(Supra)**, the issue in such a case is whether the application is capable of proper adjudication. In coming to such a conclusion, the court should consider whether the opposing party will suffer any prejudice, whether the applicant has established the basis for the grant of the orders sought and whether those orders can be granted in the manner they are sought.

10. It is not uncommon for a party to combine reliefs under different orders of the ***Rules***. For example, in ***Nuru Chemist Limited and Another v National Bank of Kenya*** **Civil Appeal No. 219 of 2002 [2008] eKLR,** the Court of Appeal was dealing with an appeal in which the respondent filed a motion under **Order 6 rule 13 (1) (b)** and **(c)** and **Order 35 rule 1** of the ***Rules*** seeking that the defence be struck out

and in the alternative or without prejudice, summary judgment as prayed in the plaint be entered against the Defendants, the Court observed as follows:

> *We note that the application that was before the superior court was brought pursuant to Order 6 rule 13 (1) (b) and (c) and under Order 35 rule 1 of the Civil Procedure Rules. These are two different provisions of the Civil Procedure Rules and each sets out its own requirements that must be demonstrated before an applicant succeeds.*

11. On the face of the application, the Plaintiff seeks an order of attachment before judgment under **Order 39** of the ***Rules***. It further seeks an order of summary judgment though it has not cited the applicable provision. **Order 51 rule 10** of the ***Rules*** requires a party to cite the provision under which an application is brought but failure to do so is not fatal to the application as it states that, *"no application shall be refused merely for reason of a failure to comply with this rule."* In this case, I find that the Defendants were not prejudiced. In their responses they were aware that the Plaintiff was seeking execution before judgment as well as summary judgment and they responded to the application accordingly. I therefore do not find any merit in this objection.

Whether Plaintiff has satisfied the conditions for grant of orders under Order 39

12. The Plaintiff seeks execution before judgment as against the 2nd Defendant and in support of prayers 3, 4 and 5 of the application, it has invoked **Order 39 rule 1** of the ***Rules*** which provide as follows:

> *1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—*
>
> > *(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—*
> >
> > > *(i) has absconded or left the local limits of the jurisdiction of the court; or*
> > >
> > > *(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or*
> > >
> > > *(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or*
> >
> > *(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:*
>
> *Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.*

13. The Plaintiff's case against the 2nd Defendant is that he is not a Kenyan citizen, has no known assets in Kenya, does not contest the claim and has made many false promises to settle the claim which suggest that he never intended to comply with the Guarantee and Indemnity under which he is liable. After demand was made on 6th July 2020, payment of USD 105,000.00 was made but no further payment has been made hence forcing the Plaintiff to file this suit.

14. Counsel for the Plaintiff submits that the applicable principle on execution before judgment is that enforcement of a decree should not be frustrated by removal of a defendant's assets from the Court's jurisdiction or departure of a defendant from the jurisdiction. He asserts that this principle is so fundamental that even where it has not been shown that there is active dissipation of assets to avoid execution, circumstances may warrant that a defendant show cause why execution should not issue and such circumstances include a situation where a defendant is a foreigner with no known assets within the jurisdiction. Counsel cited the case of ***Boniface Owiti Okiri v Jiangxi Zhongmei Engineering Construction Company Limited*** **HC COMM No. 5 of 2019 [2020] eKLR** to support his proposition.

15. In response, Counsel for the 2nd Defendant submitted that the Plaintiff has not met the threshold for grant of the orders under **Order 39** of the ***Rules***. Counsel submitted that a plaintiff must also show that the defendant is about to leave Kenya in circumstances affording a reasonable probability that the plaintiff may be obstructed or delayed in the execution of any decree that may be passed in his favour. Counsel cited several decisions among them; ***Wambugu, Motende & Company Advocates v Kamal Bhusan Joshi & 4 others*** **HCOMM Misc. Appl. No. 23 of 2012 [2014] eKLR**, ***International Air Transport Association and Another v Akarim Agencies Company Limited & 2 Others*** **HC COMM No. 15 of 2014 [2014] eKLR** and ***Ftg Holland v Afapack Enterprises Limited and Another*** **NRB CA Civil Appeal No. 171 of 2014 [2016] eKLR** to show that the plaintiff must establish a prima facie case to demonstrate the ingredients set out under the rule. Counsel added that the application for arrest and furnishing security of costs cannot be issued for purposes of pressuring, harassing or punishing a defendant and or as a type of asset-stripping tool.

16. The 2nd Defendant relied on his replying affidavit to show that he had informed the court that he had no plans to abscond from the jurisdiction of this court and that this was not rebutted by the Plaintiff. His counsel pointed out that it would appear that the Plaintiff has invoked the provisions of **Order 39** of the ***Rules*** simply because the 2nd Defendant is not a Kenyan Citizen and that the burden of proof under **Order 39** of the ***Rules*** rests with the Plaintiff to show that he is about to abscond from the jurisdiction.

17. The principles governing attachment before judgment were laid down by the Court of Appeal in the case of ***Kuria Kanyoko t/a Amigos***

Bar and Restaurant vs. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu **[1982-88] KAR 1287-1334** as follows:

> *The power to attach before judgement must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38, Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.*

18. The principles were adopted by this court in the case of ***Shiva Enterprises Limited vs. Jivaykumar Tulsidas Patel t/a Hytech Investment*** **HC COMM No. 501 of 2006 [2006] eKLR**, where Kasango J., observed as follows:

> *That a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. The jurisdiction that the Plaintiff invoked has to be appropriately exercised to ensure that a party meets the aforestated high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the Plaintiff against the Defendants act aimed at defeating judgment that may be entered. It is however not the intention of that jurisdiction to harass or to punish the Defendant before judgment is entered against him. It is worthy to quote from the case of* ***Kuria Kanyoto T/A Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu [1988]2 KAR*** *…*

19. This position was reiterated in ***FTG Holland v. Afapack Enterprises Limited & Another*** **(Supra),** where the Court of appeal held the view that, *"The power to attach before judgment is not to be exercised lightly and without clear proof of the mischief to be avoided."*

20. The decisions I have cited show that the burden is on the Plaintiff to prove, by way of affidavit or otherwise that the 2nd Defendant is about to abscond or leave the local limits of the jurisdiction of the court or is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the 2nd defendant in the suit. It is not enough to merely allege the fact or recite the provisions of the rule.

21. I have read the deposition by Duncan Potts sworn on behalf of the Plaintiff together with the annexures therein and I do not find any evidence that the 2nd Defendant is about to abscond or flee from Kenya in circumstances that the court would conclude that he is intent on obstructing justice for the Plaintiff. The Plaintiff's apprehension, which I find mistaken, is that the 2nd Defendant is not a Citizen of Kenya and has no known assets save for his shares in the 1st Defendant. This is not evidence that the 2nd Defendant is about to leave the country.

22. The Plaintiff's case is hinged on the fact that the 2nd Defendant is not a Kenyan citizen hence the court ought to infer that he is a person against whom orders under **Order 39** of the ***Rules*** should issue. Although the case concerned a company, the Court of Appeal dealt with a similar situation in ***FTG Holland v. Afapack Enterprises Limited & Another*** **(Supra)** where the High Court placed much emphasis on the fact that the Company was domiciled in Holland and without more issued a warrant of arrest for the directors who were ordered to provide security. Reversing the decision of the High Court, the Court of Appeal expressed the following view, which I find relevant to this case:

> *The respondent sought to persuade the court below that, since the appellant is a foreign company domiciled in Holland with no known assets in Kenya, there was real likelihood that should the respondent succeed in its counter-claim, it will be unable to execute the decree. In that case, by* ***sub rule 1 (b)*** *of* ***rule 5,*** *it was incumbent upon the respondent to demonstrate, by affidavit, and the court to be satisfied, from that evidence, that the appellant was about to leave Kenya under circumstances that would lead to reasonable apprehension that it intended to obstruct or delay the execution of any decree that may be passed in the counter-claim. There was no scintilla, not a whit of evidence to prove any of the above. Having found no such evidence, but concerned that the appellant was a foreign registered company with no known assets in Kenya, the learned Judge, quite uncharacteristic, so to speak, fished out* ***rule 5*** *to protect the respondent's interest. That rule provides that [Rule 5 of the Civil Procedure Rules set out in full]*
>
> *Again for the court to have resorted to this rule it had to be satisfied that the appellant was about to dispose of its assets or repatriate them from the local limits of the court's jurisdiction. The respondent provided no evidence at all to demonstrate that any of the above was about to happen.*

23. Counsel for the Plaintiff referred to the case of ***Boniface Owiti Okiri v Jiangxi Zhongmei Engineering Construction Co*** **(Supra)** to support its case that since the 2nd Defendant was a foreigner, the orders prayed for ought to be issued. That decision is readily distinguished on the basis of its own facts. The company in that case had completed the project and wound up its business in the area hence the court was persuaded to issue the order.

24. In this case, the rather thread bare deposition of Duncan Potts is bereft of any facts upon which the court may infer or indeed conclude that the 2nd Defendant is about to abscond from the local limits of the court's jurisdiction or is disposing of his property in a manner that would obstruct justice for the Plaintiff. Moreover, the fact that the 2nd Defendant is not a citizen is not of itself a reason to grant the application. I find and hold that it has failed to satisfy the requirements under **Order 39 (1)** and **(5)** of the ***Rules***.

Whether court should enter summary judgment

25. The Plaintiffs case for summary judgment against the Defendants is set out in the Plaint as I have outlined in the introductory part of this ruling. The Plaintiff is the principal debtor while the 2nd, 3rd and 4th Defendants are jointly and severally liable to pay the Plaintiff the amount owed by the 1st Defendant under the Guarantee and Indemnity. The Plaintiff avers that it has already issued demand letters dated 6th July 2020 to the 2nd, 3rd and 4th Defendants. It contends that following admission of the claim, the Defendants do not have any defence to its claim and that no triable issue can arise.

26. The Defendants resist the application for summary judgment on technical as well as substantive grounds. The Defendants submit that an application for summary judgment under **Order 36** of the ***Rules*** can only be made after a defendant has entered appearance but before it files

defence. In this case, the Defendants complain that the application was made not only before the Summons to Enter Appearance ("the Summons") were served on them but also before they entered appearance.

27. In support of this submission, Counsel for the 1st and 2nd Defendants, relies on ***Richard H Page & Associates Ltd v Ashok Kumar Kapoor*** **NRB HCCC No. 382 of 1978 [1979] eKLR** where the court held that a preliminary requirement for an application for summary judgment is that the defendant must have entered appearance. That decision was cited with approval in ***Sturt Transport Limited v Dajachana Mining Company Limited*** **NRB HCCA No. 178 of 2015 [2016] eKLR**.

28. Counsel for the 1st and 2nd Defendants further submits that the purpose of Summons is to make a defendant aware of the suit filed against them and to afford them the time to appear and follow the process of the law and that it would be improper to assume that the purpose of Summons would be achieved when the Defendants had not been served.

29. In response to the Defendants' arguments, Counsel for the Plaintiff, argues that **Order 36 rule 1(1)** of the ***Civil Procedure Rules*** contemplates that as soon as the Defendant enters appearance in a suit, the Plaintiff may apply for summary judgment hence the application is not premature. Counsel submits that it would be illogical to argue that even where the Defendants have become fully aware of the particulars of the claims against them upon being served with a Plaint, that the Plaintiff should not apply for summary judgment merely because Summons have not been issued yet this court has previously observed otherwise in ***Crissam Acres Limited v CFC Stanbic Limited and Another*** **HC COMM No. 261 of 2015 [2020] eKLR.**

30. Counsel further submits that **Order 36** of the ***Civil Procedure Rules*** contemplates that a Defendant may oppose an application for summary judgment by pointing to triable issues by means other than a statement of defence. Counsel urged that this shows that by insisting on service of Summons as a strict precondition to filing an application for summary judgment would be raising a procedural requirement to a fetish.

31. Prayer 7 of the Plaintiff's application seeks that summary Judgment against all Defendants as prayed in the Plaint. Summary judgment is provided for under **Order 36(1)** of the ***Rules*** which states:

> *36(1) In all suits where a plaintiff seeks judgment for—*
>
> *(a) a liquidated demand with or without interest; or*
>
> *(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,*
>
> *where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.* [Emphasis mine]

32. The Defendants are correct to assert that under **sub rule 1** aforesaid, the Plaintiff may apply for summary judgment when the defendant has appeared. I agree with the decision in ***Richard H Page & Associates Ltd v Ashok Kumar Kapoor*** **(Supra)** that the filing of a memorandum of appearance by the defendants is a precondition for the Plaintiff to file an application for summary judgment. The rule cannot be read otherwise or ignored and it is clear that the right of the Plaintiff to file an application for summary judgment only arises once the defendant has entered appearance.

33. It must be recalled that entry of summary judgment determines the matter and as the name suggests, the hearing of the case is truncated thus in the various decisions, our courts have emphasized that the court must be satisfied that there is no case to go to trial (see for example ***Postal Corporation of Kenya v Inamdar and 2 Others*** **[2004] 1 KLR 359**). That is why a party must appear before the court is called upon to exercise its summary jurisdiction and the only way the defendant can appear in a matter is by being served with Summons or waives the right to be served.

34. The importance of Summons to Enter Appearance cannot be wished away. In ***Crissam Acres Limited v CFC Stanbic Limited and Another*** **(Supra)**, the court merely noted that the responsibility of the duty to sign and seal Summons and to notify the plaintiff that they are ready for collection falls on the court. This does not relieve the Plaintiff of its duty, under the overriding objective, to follow up the Summons or indeed ensure they are served on the defendant. It is the Summons that formally informs the defendant of suit and invites the defendant to defend it (see ***Equatorial Commercial Bank Limited v Mohansons (K) Limited*** **MLD HCCA No. 236 of 2006 [2012] eKLR**).

35. It is also upon service of Summons that time for compliance with essential steps in the proceedings starts running against the defendant. If the Summons are served and the defendant fails to enter appearance and or file defence within the time prescribed, then the plaintiff will be at liberty to apply for default judgment thus rendering the application for summary judgment otiose.

36. I therefore reject the Plaintiff's argument that the court should overlook the service of Summons and proceed on the basis that the Defendants have filed their replying affidavits. The application for summary judgment was filed with the plaint on 24th August 2020. The 1st and 2nd Defendant entered appearance on 12th October 2020 while the 4th Defendant entered appearance on 8th October 2020. The 3rd Defendant is yet to enter appearance.

37. In light of the clear provision of **Order 36 rule 1** of ***Rules***, I find and hold that the application for summary judgment was premature having been filed before the defendants entered appearance. The prayer for summary judgment is therefore struck out.

Disposition

38. For the reasons I have set out above, save that the prayer for summary judgment is struck out, the Notice of Motion dated 18th August 2020 is now dismissed with costs to the 1st, 2nd and 4th Defendants.

39. Mr Esmail, Advocate is hereby discharged from his undertaking as directed by the court on 26th August 2020.

DATED and DELIVERED at NAIROBI this 30th day of NOVEMBER 2020.

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.