REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COURT

COMMERCIAL & ADMIRALITY DIVISION

CIVIL CASE. NO. 335 OF 2016

ECOBANK KENYA LIMITED.....PLAINTIFF

VERSUS

MERCBIMA INTERNATIONAL LIMITED.....1st DEFENDANT

JOE MUSYIMI MUTAMBU.....2ND DEFENDANT

LYDIA NGUNJU KIBUE.....3RD DEFENDANT

RULING

1. The Plaintiff is a licensed banking institution conducting banking business locally. In April 2014 at the request of the Defendants the Plaintiff agreed to extend banking facilities to its customer, the 1st Defendant. The facility was in the form of asset backed finance. The value of the facility was Kshs. 72,250,000/= and it was to enable the 1st Defendant to purchase ten (10) twenty-five ton tipper-trucks from Foton East Africa Ltd ("the seller"). By way of security the Plaintiff sought and obtained a joint and several guarantee from the 2nd and 3rd Defendants. Additionally, the Plaintiff also secured a Buy-Back guarantee from the seller.

2. The securities were later perfected and the facility amount of Kshs. 72,250,000/= disbursed to the seller. The tipper-trucks were also registered in the joint names of the Plaintiff and the 1st Defendant on diverse dates in April and May 2014. The 1st Defendant then commenced payment of the agreed installments only to default shortly. The Plaintiff made demands and also called in the personal guarantees of the 2nd and 3rd Defendants. When payment was not forthcoming the Plaintiff moved to repossess the trucks in January 2015, with the amount of Kshs. 75,239,927/82 stated to be outstanding. The tipper-trucks were all subsequently bought back by the seller pursuant to the provisions of the Buy-Back guarantee.

3. The Plaintiff now claims from the Defendants the amount of Kshs. 42,182,068/60 as the outstanding shortfall due and outstanding as at 1 April 2016 together with interest.

4. The above narrative is largely not in contest and may be retrieved from the affidavits and pleadings filed by the parties. The Defendants however contend that the seller released only six (6) and not ten (10) tipper-trucks to the 1st Defendant.

5. It is further the Plaintiff's position that the Defendants are indebted to the Plaintiff and there is need for the court to invoke its summary procedure and enter judgment for the Plaintiff. The Plaintiff has consequently sought to have the Defendants' joint defence struck out.

6. Mr. Shah who appeared for the Plaintiff contended that the defence statement raises no triable issue and that the alleged issues are simply smokescreens. Mr. Shah was clear that there was uncontested evidence of the advance and subsequent default and a recovery process including the enforcement of the Buy-Back guarantee which left the Plaintiff with a shortfall. Counsel relied on the cases of **D.T.Dobie & Company Ltd *v* Muchina [1982] KLR 1** as well as **Job Kilach *v* Nation Media Group Ltd & Others [2015]eKLR** for the propositions that where a defence disclosed no reasonable ground for defence a triable issue could not be inferred and that a mere denial could not constitute a defence. Finally, Mr. Shah also relied on the case of **747 Freight Conversion LLC *v* One Jet One Airways Kenya Ltd & Others [2014] eKLR** for the proposition that where an advance is admitted there is no need to venture into a trial.

7. Mr. Mbuvi who appeared for the Defendants contended that the Defendants had a tenable defence which raised triable issues. Whilst relying on the affidavit of the 2nd Defendant filed on 16 March 2017, Mr. Mbuvi submitted that the Plaintiff and the seller frustrated the transaction as all the tipper-trucks were never supplied to the 1st Defendant and the six trucks which were delivered were repossessed hardly six (6) months after the transaction date.

8. Mr. Mbuvi asserted that the defence advanced by the Defendants was not bare or hopeless but was reasonable and had raised triable issues which included accounts as well as allegations of fraud. For completeness, Mr. Mbuvi added that the Defendants would seek to enjoin the seller to the proceedings to indemnify the Defendants.

9. I start by pointing out that courts of law always encourage determination of disputes on merit rather than through summary process. Thus in an application for striking out a defence statement for being frivolous or vexatious or not disclosing a reasonable cause of defence, the court ought to be strictly satisfied that the defence statement is untenable and raises no plausible triable issue of law or fact. An issue need not be one which the defendant must succeed on. It need only be a bona fide one which calls for judicial examination and trial: see **Olympic Escort International Co. Ltd & 2 others *v* Perminder Singh Sandhu & Another [2009] eKLR.** If the defence is fair and reasonable the court must not be in a hurry to strike it out as the power to strike out must be cautiously exercised and only in cases where the "defence is so weak that it is beyond redemption and incurable by amendment": see **D.T. Dobie & Company (K) Ltd *v* Muchina [1982] KLR 1.**

10. Effectively, the defence must not be evasive. It must not be bare or ambiguous. It must however answer the claim with substance and comprehensively. Where the defence is obviously unwinnable for the defendant and is bound to fail, where the defence is without any possible benefit to the Defendant and can only lead to a pointless and wasteful litigation then the defence will be struck out. It would appear contrary to the right of access to court but the power to strike out is always to be applied only in genuine and clear cases when it is obvious that any trial would provide no assistance. It is due to the inherent right of access to court, that the court will give an opportunity to the Defendant to amend where it appears that life may be injected in the apparently hopeless and hapless defence: see **Wambua *v* Wathome & Another [1968] EA 40.**

11. In the instant case, it is a common cause that the 1st Defendant was advanced banking facilities by the Plaintiff. It is also not in controversy that the 1st Defendant defaulted and that the facility as well as the guarantees was called in by the Plaintiff. The Plaintiff also proceeded to exercise its rights under the Buy-Back guarantee issued by the seller to cause the seller to buy back the tipper-trucks once they had been repossessed. The Buy-back guarantee provided for how much the tipper-trucks were to be re-purchased by the seller depending on the time of repossession. The repossession herein was within one year of the facility transaction. The seller under the Buy-Back guarantee was to purchase the tipper-trucks at 65% of their value.

12. There is no clarity as to how much the seller re-purchased the tipper-trucks, at least the statements of

account do not clearly exhibit this aspect. Thus when the Defendants seek accounts, I do not view it that there is no merit in their contention that the Buy-Back amounts are not fully accounted for. The rather novel nature of the transaction would dictate caution as well. It is unclear when exactly the Buy-Back option was exercised by the seller and how much was paid by the seller to the Plaintiff.

13. The court may have to interrogate this transaction and determine the extent or scope of the Plaintiff's duty to the Defendants under the Buy back guarantee while clearly outlining the parties rights and obligations. There is a dearth of judicial determination on this sort of transaction. It will be necessary to clearly outline the legal position of the parties. In these respects, I do view it that the defence is intelligible enough and lacks any contradiction. I am thus not ready to state that this is a clear plain and obvious case where the radical summary procedure should be invoked.

14. In my view, the defence is not too weak to be redeemed or even to proceed on to trial. The Plaintiff, it is true, may be owed money by the Defendants on their personal primary and secondary obligations to repay but it is unclear, in view of the defence raised, how much amount exactly is due. It could be the amount claimed or it could be less but this is a fact that only the trial session of the court will establish.

15. In the result, I find that the application to strike out the defence is not merited. The defence is not all that fanciful. It has substance in so far as it demands that the Plaintiff properly accounts for the monies it received under the Buy-Back guarantee. That issue alone should take the parties to trial.

16. I have to dismiss the application dated 24 January 2017and it is dismissed with costs to the Defendants.

Dated, signed and delivered at Nairobi this 21st day of April, 2017.

J. L. ONGUTO

JUDGE