



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT 153 OF 2003**

**EAST AFRICAN DEVELOPMENT BANK LIMITED.....PLAINTIFF**

**VERSUS**

**(1) MUJTABA JAFFER**

**(2) MANOJ SHAH**

**(3) AMRITLAL DEVANI.....DEFENDANTS**

**R U L I N G**

1. On 7/7/2003 and by a plaint dated 2<sup>nd</sup> July 2003, the plaintiff sued and sought to recover from the defendants, jointly and severally, the sum of **USD 3,578,413** together with interests at 12% per annum from the 1/3/2003 till payment in full.

2. That suit was grounded on a loan agreement dated 1/10/1998 made between the plaintiff and Kenya Bus Services (Mombasa) Ltd by which the plaintiff agreed to extend to the said Kenya Bus a financial accommodation in various currencies equivalent Special Drawing Rights of 1,600,000 on condition that the defendants gave their personal guarantees in form and substance acceptable to the plaintiff. Pursuant to that agreement the three (3) defendants did agree to and guaranteed the obligations of Kenya Bus Services (Mombasa) Limited, as a consideration of the plaintiff entering into the loan agreement, by a guarantee dated 1/10/1998.

3. Pursuant to a chamber summons dated 9<sup>th</sup> July 2010, and the consent order recorded in court on the 26/7/2016 the plaintiff was granted leave to amend the plaint whose purpose, it appears was to plead that there was created an additional security by way of a **'Debenture Of The Debtor's All Assets'** including a parcel of land known as Mombasa (Block I) 315, which land was sold by the receiver managers at Kshs.38,000,000 leaving the debt outstanding at USD 9,961,114.91 as at the date of the amendment.

4. It is that plaint as amended which the defendant has by a Notice of Motion dated 26/5/2015 sought to be struck out and the suit dismissed with costs to the defendant. The application to strike out is grounded on the allegations that the agreements sought to be enforced are the products of a securitization process that is illegal and void in law incapable of maintenance as against the defendants and that there cannot be an agreement to guarantee an illegality.

5. That application was supported by an affidavit sworn by the second defendant, Mr. Manoj Shah, who swore to have been authorized by his co-defendants to swear the affidavit. That affidavit annexes and exhibits a bundle of documents said to be the evidence of the agreements between the parties and include:-

- (i) Loan agreement signed between the plaintiff and Kenya Bus Services (Mombasa) Limited.

- (ii) Debenture dated 13/11/1998 created by Kenya Bus Services (Mombasa) Ltd in favour of the plaintiff.
- (iii) Legal charge dated 13/11/1998 over Mombasa Block 1/315 and Registered on 19/11/1998.
- (iv) Joint guarantee agreement between the plaintiff and the three defendants apparently assessed and stopped under Stamp Duty Act.
- (v) A document appointing receivers and managers of Kenya Bus Services (Mombasa) Ltd dated 10/4/2001.

6. As between the parties to this dispute, of all the documents exhibited, it is to me only the loan agreement and the guarantee agreement which are of relevance to the application before me. I say only the two are of relevance because, by “**recital A**” of the guarantee agreement, that agreement is evidently and undeniably grounded on the loan agreement. I would therefore proceed from the stand point that the two agreements are fused and dependent upon each other and should be construed and taken to be a continuation of each other.

7. The application was equally supported by a supplementary affidavit sworn by the same 2<sup>nd</sup> defendant yet again whose purpose and only import was to answer to the Replying affidavit and show that the impugned documents were evidently drawn by the Secretariat, East African Development Bank, and to exhibit correspondence with the Law Society Of Kenya to the effect that RUGAMBWA JOHN CYRIL PESHA was not licensed to practice law within Kenya and that an individual licensed by the High Court of Tanzania is not an advocate for the purposes of the Advocates Act, Laws of Kenya.

8. The application was opposed by the plaintiff by the affidavit of one Robert Murithi who described himself as the Principal Investment Officer of the plaintiff. His opposition, grounded on the advice of the counsel, is that section 34 of Advocates Act set out the documents to be prepared by an advocates and that a loan agreement and guarantee are not such documents. He then adds that each of the (5) five security documents prepared to secure the plaintiffs loan to the defendants was a stand-alone document and securities on equal footing but admit that Mr. Pesha was an in-house counsel with the plaintiff at the time and additionally that his experience as a banker was that guarantees were routinely prepared by in-house counsel.

9. The deponent in effect concedes that the guarantee is evidently prepared by the plaintiff’s secretariat but that the records in his office reveal that the same were prepared by Anjarwalla Abdulhussein & Co. Advocates. Those facts are to this court what would be critical for the determination of the application at hand.

#### Submissions

10. On the 11/7/2016 the court while adjourning the application due to workload for the day directed that the parties file and exchange written submissions.

11. Pursuant to such direction the Defendants/applicants did not file submissions for the reasons that Mr. Luseno was taken ill. The defendants had however filed a list of authorities and copies of such authorities on 13/01/2016. The plaintiff on its sides did file submissions dated 5/10/2016 on 6/10/2016 together with list of authorities dated 8/7/2016 and filed on 11/7/2016 and a supplementary list of authorities dated 5/10/2016 and filed in court on 6/10/2016.

12. At the hearing Mr. Kiragu when engaged by the court on the principle of illegality and unjust enrichment referred the court to a decision of the Supreme Court of England in **Patel -vs- Mirza** [2014]EWCA Civ 1047, and promised to avail a copy to the court. He indeed kept his promise and by a letter dated 10/10/2016 address the Deputy Registrar and received a court on 12/10/2016 a copy of the decision was availed to court.

13. During the parties’ address to court on the application, Mr. Luseno, Advocate, ad relied entirely on the facts deponed to in the affidavits and grounds of the application as buttressed by the documents exhibited and submitted that the charge and the guarantee having been prepared by the secretariat, East African Development Bank Ltd were invalid for reasons of having been prepared by an unqualified person and therefore an illegality under the provisions of the Advocates Act. The advocate then relied on the decision by the Supreme Court in **National Bank of Kenya Limited vs. Anaj Warehousing Limited** [2015] eKLR for the proposition that where a document the law requires to be prepared by an advocate is prepared by an unqualified person, the same is void for all purposes. Other decisions were equally cited for the proposition that the guarantee could not be severed from the loan agreement and that documents the law dictate to be prepared by an advocate must be so prepared.

14. On the basis that the guarantee agreement was never prepared by an advocate, the advocate then cited the decision on **Kenya Airways Ltd vs Satwant Sing Flora**, [2013]eKLR for the proposition that a court of law has no business enforcing an illegal contract. For those reasons Mr. Luseno pleaded with the court to allow the

application and strike out the suit with costs.

15. In his response, Mr. Kiragu for the plaintiff opened his submission with a remark that the supreme court of England has recently held that the illegality of a contract is no bar to the recovery of money paid pursuant to such a contract. The decision in **Patel vs Mirza [2016] UKSC 42** was cited from that proposition. Secondly, Mr. Kiragu submitted that striking out is a drastic and draconian step to be taken by a court and cited **DT DOBI VS MUCHINA** for the proposition that it is a discretion to be exercised in the clear of the clearest of cases. He then invoked the provisions of Article 159 to ask the court to note that since the promulgation of the new constitution there has been shift from technicalities to substance.

16. On the documents Mr. Kiragus submission were that the documents were drawn by the borrowers advocates who were by extension the advocates for the defendant and that the averments on oath by Mr. Robert Murithi having not been responded to was deemed uncontroverted and relied on the decision in **Mohammed vs Haidara [1972] EA 166**, for the proposition that allegations not responded to remain unrebutted.

17. On section 34 of the advocate Act the advocates submitted that a guarantee is not one of the documents the law makes mandatory to be prepared by an advocate. He submitted that the purpose of the law is to stop persons not qualified from drawing certain documents and that such acts are criminal attracting criminal sanctions which is outside the domain of a civil court. The decision in **Clerke – vs Sundhi [1963] EA 107** was cited to support that position.

18. On whether the guarantee was severable from the loan agreement he reiterated the deposition by Mr. Murithi that the guarantee was a stand-alone document and only created a right between the plaintiff and the defendant. He concluded by asking the court to try and discern the intention of the parties and that no prejudice would be suffered if matter was allowed to proceed to trial. He submitted that the application was a candidate for dismissal.

19. In his rejoinder Mr. Luseno referred the court to paragraph 8 of Mr. Robert Murithi's affidavit to clarify where and by whom the document was drawn. On whether or not the documents were severable Mr. Luseno referred the court to paragraph 3 of the amended plaint which, to him, make the documents incapable of being severable. He then relied on the decision in **Langat vs Kipkemobi Keter [2013]eKLR** to the effect that the court in duty bound to uphold the law and the constitution.

#### **Analysis and determination**

20. The application and its determination would revolve around the question whether the guarantee is a document the law dictates must be prepared by an advocate as defined in law and if so the effect of such a document not being prepared by an advocate.

#### **Is the guarantee a document governed by section 34 Advocates Act**

21. Section 34 provides:-

#### **“Unqualified person not to prepare certain documents or instruments**

**(I) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument:-**

**a) relating to the conveying of property or**

**b) for, or in relation to, the formation of any limited liability company, whether private or public; or**

**c) for, in relation to, an agreement of partnership or the dissolution thereof; or**

**d) for the purpose of filing or opposing a grant of probate or letters of administration; or**

**e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or**

**f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument.**

22. I am not in doubt that the documents being challenged herein are neither conveyances, do not relate to partnership, incorporation of a company nor legal proceeding. I however hold the view that they are documents for

which the chief justice has prescribed fees under Section 44 of the Act. I will therefore disregard the rest of that provision as quoted save for 34(1)e.

23. Whether or not the guarantee is a document that the law requires to be prepared by an advocate or not one has to look at the advocates Remuneration order. The part of the order that I find to be of assistance is **Schedule I, Third Scale, Note 2**. It provides:-

## **2. In scales 1, 2 and 3—**

**(a) “mortgage” includes a conveyance, assignment or other assurance, or an agreement to convey, assign or otherwise assure the immovable property or any estate, interest or other right therein to secure the payment of moneys;**

24. The documents sued upon provided at relevant portions as follows:-

### **THE LOAN AGREEMENT**

**Section 3.04 (a). The Company agrees and undertakes that the principal sum of the Loan, interest and other charges thereon shall be secured as under:-**

**i) By a first floating debenture on all assets, both present and future, of the Company.**

**ii) By a first legal charge on all the fixed assets of the Company comprised in the grant of lease over Plot No. L.R. 315 Block 1 on Zanzibar Road in Kilindini Industrial Area, Mombasa.**

**iii) By a fixed debenture charge on 23 Sanayi 45 seater buses jointly owned by the Company and EADB, insured against riot, theft and fire and EADB interest to be expressly endorsed thereon.**

**iv) By personal guarantees of sponsors, namely Mujtaba Jaffer, Manoj Shah and Amritial Shah in form and substance acceptable to EADB.**

**v) The security provided for in sub-section (a) (i) of this Section shall be shared on pari-passu basis between EADB, KCB and any other lender as shall have been approved in writing by both EADB and KCB.**

### **GUARANTEE AGREEMENT**

**Section 2.01.**

**Save as hereinafter provided, the guarantors and each of them, irrevocably absolutely and unconditionally guarantee as primary obligator and not merely as surety the due and punctual payment of the loan with interest, commission, commitment fees and all other charges thereon as the same shall become due and payable by the company to EADB under the terms of the loan agreement, upon default and receipt by the guarantors or each of them of EADB’s demand**

25. My reading of that provision of the law and the document upon which the suit is grounded leave me with no doubt that the guarantee agreement is a document, as it shows to be an assurance for the payment of the money advanced to Kenya Bus Services (Mombasa) Ltd, that the Kenyan law forbid an unqualified person from preparing or drawing.

26. The next question then is, who is an advocate in law? Section 2 of the Advocate Act defines an advocate as a person whose name is duly entered in the Role of Advocates etc. As much as the term unqualified person is not defined in the Act, I take it to mean, for the purposes of the Act, one who is not an advocate.

27. Indeed there are public interest considerations and policies informing every enactment by parliament. This court as a state organ is bound to observe the rule of law which is the bastion of democracy and well-being of every civilised society. The law forbids an unqualified person, which MR. PESHA is conceded to have been by the confirmation of the Law Society of Kenya, from preparing the document he did prepare. He was therefore not qualified to act in preparation and drawing a document which it was the preserve of an advocate in Kenya to prepare. Now that he did so, he contravened the law and that cannot be blessed or countenanced by this court.

28. The Supreme Court has found and held in **National Bank of Kenya Ltd vs Anaj Warehousing Ltd [2015] eKLR**,

that such documents are unenforceable . In own words the court said:-

**“[68] The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.”**

29. I am bound by the decision, that a document prepared by an unqualified person is void for all purposes. I take the expression ‘*void for all purposes*’ to mean void for every intention to rely on it including an attempt at recovery of money advance and secured by it.

30. Having come to the conclusion that the guaranteed agreement was a document as defined under section 34 (1)g, Advocates Act, and having found that it is void for all purposes, and the suit herein being grounded on the document so found, it follows that there is no suit that merits being sustained to be heard on the merits. I say that there is no magic in hearing on merits where it is obvious that there is no suit to justify employment of court time.

31. The upshot is that the application dated 2/5/2015 is merited, I allow it and order that the plaintiff’s plaint dated 2/7/2013, as amended, be and is hereby struck out with costs to the defendants.

**Dated and delivered at Mombasa this 20<sup>th</sup> day of December 2016.**

**HON. P.J.O. OTIENO**

**JUDGE**