REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO. 219 OF 2013

FIDELITY COMMERCIAL BANK LIMITED……..PLAINTIFF

V

GREENWOODS LIMITED ……....1ST DEFENDANT

MOYEZBHANJI .....2ND DEFENDANT

SADRUDDINBHANJI …… 3RD DEFENDANT

RULING

Striking Out Defence

[1] The Plaintiff says that;

> **"The Defence set up by the 1st Defendant is not a genuine or bona fide defence. It is a red herring and a sham. It can only delay justice. It is for all the above reasons a scandalous, frivolous and vexatious Defence …"**
>
> Per Justice G.K. Kimondo in **Mohammed Hassim Pondor & Another -vs- Summit Travel Services Limited & 4 other (2011) eKLR**

[2] Therefore, the Applicant prays for the defence herein to be struck out. The application is dated 4th September 2013 and is based on the Supporting Affidavit of Anthony Mwangi sworn on 4th September 2014. It is also premised upon the ground on the application and others elaborated in the submissions filed herein.

The Applicants gravamen

[3] The Applicant submitted that the Defendants requested the Plaintiff to open Current Account No 11104061 in the names of the 1st Defendant. The Plaintiff obliged upon presentation of the Defendants Account opening forms. See exhibit AM. It is also undisputed that the 1st Defendant made withdrawals upon the said account, causing an overdraft of a sum of Kshs.12,833,733.00, against which payments were made, but leaving a debit balance which is the

subject of this suit.The 2nd and 3rd Defendants signed instruments of guarantees and indemnities committing to pay to the Plaintiff an aggregate maximum amount of Kshs.12,833,733.00 should the 1st Defendant fail to pay the said amount, and the said 2nd and 3rd Defendant also agreed with the Bank, … "**as primary obligors and not merely as sureties to fully indemnify the Bank against any loss which the Bank may incur in the event the whole, or any part of the Principal's Obligations ….".** Refer to Clause 4 of the Guarantee Instrument). The Guarantees are not denied. See Paragraph 4 of the 2nd Defendant's Replying Affidavit, sworn on 5th February 2014 by Moyez Bhanji admitting to execution and delivery of the same.

[4] In view of the above facts of the case, it is the Plaintiff/Applicant's position that the Defence dated and filed on 1st July 2013 in this suit ought to be struck out under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 for the following reasons;

A. **Paragraphs 1 –to- 5 of the Defence;**Are mere denials and an abuse to the Court process.
B. **Paragraphs 6, 7 and 8 of the Defence;** disclose no reasonable cause of Defence in law and are scandalous, frivolous and vexatious. **Paragraph 6 of the Defence –**alleges that for the Plaintiff to recover any monies from the Defendants, it must show that there was a loan, and show proof by way of Loan Application and Loan Agreement. This is wrong proposition of the law. See the locus classicus on the issue in **National Bank of Kenya –vs- Barrak Deya Okul (2006) eKLR** in which the Court stated that;

> **"it is well established as a matter of banking law and practice that where a customer opens a current account with no express agreement with the Bank and the customer draws a cheque on the account which causes the account to go into overdraft, the customer has by necessary implication requested the Bank to grant an overdraft of the necessary amount on its usual terms as to interest and other charges and in deciding to honour the cheque, the bank has by implication accepted the offer."**

The above position is supported by the holding of the Court of Appeal, England in **Emerald Meats (London) Ltd –vs- AIB Group (UK) Pic.**

C Paragraph 7 of the Defence – alleges that the 2nd and 3rd Defendants did not understand the complex legal terms of the guarantees. This statement is frivolous scandalous and cannot stand because; for the following reasons: the said Defendants voluntarily agreed to execute the guarantees. See Paragraph 4 of the Replying Affidavit.It is a general rule in law, that "**a person who accepts an offer made in a written document by signing and delivering that document is bound by all the terms of that document, whether or not he has read them.."** per Halsbury's Laws of England Volume 9, paragraph 686. Therefore, the Defendants having guaranteed the debt of the 1st Defendant cannot now say that they did not obtain advice or understand the terms of the guarantee, which they duly signed in presence of witnesses.

D Paragraph 8 of the Defence - is an attempt to apportion blame for the sums claimed to other parties, who are shareholders in the 1st Defendant. Whatever the purpose of the monies or the internal arrangements within the 1st Defendant as to who should have paidis of no concern to the Plaintiff.The documentation is quite clear that the 1st Defendant had an obligation to pay the monies due, and failing to do so, the 2nd and 3rd Defendant's guaranteed payment of the same.There is no evidence or anything at all between the Plaintiff and the said third parties or any other third party, that such other person would be liable for the debts of the 1st Defendant, except the 2nd and 3rd Defendants.

E Paragraph 9 of the Defence – several demands have been issued and all attempts to recover the debt from the 1st Defendant were made in vain. Various calls on the said Defendant to make payments to the account were ignored.Further, the 2nd Defendant has in Replying Affidavit stated that he is a Director of the 1st Defendant (1stParagraph) and he cannot now deny the

Company, which he has a trite legal responsibility as to its affairs.

[5] The Plaintiff/Applicant submitted further that the Defendants have variously admitted the amount outstanding but have been claiming that third parties are responsible to indemnify them, which claim the Bank states is an internal arrangement within the structures of the 1st Plaintiff and has no place in the contract made between the Plaintiff and the Defendants herein. See annexure AM5 of the Supporting Affidavit. Whether or not there was a Board Resolution by the 1st Defendant authorizing its actions, it is trite that the **Torquands Case** settled the matter thus;

> **"...internal management rules cannot bind a third party unless they are brought to its notice".**

Refer also to other cases such as **Mohammed HassimPondor& Another -vs- Summit Travel Services Limited & 4 others (2011) eKLR**, where the Court made a finding that;

> **"The Defence set up by the 1st Defendant is not a genuine or bona fide defence. It is a red herring and a sham. It can only delay justice. It is for all the above reasons a scandalous, frivolous and vexatious Defence** "per Justice G.K. Kimondo in the cited case, Authority No. 4 in the Plaintiff's List of Authorities.

[6] On the basis of the foregoing, the 2nd and 3rd Defendants agreed to be and are therefore legally bound as guarantors to the debt of the 1st Defendant. They cannot shift their responsibilities under the guarantees to third parties unknown to the Plaintiff.The Defence filed herein discloses no reasonable cause of Defence in Law, is scandalous and vexatious and is filled with intention to embarrass or delay the fair trial of the action, and is otherwise an abuse of the process of court.The Defence is evasive and raises no bona fide triable issues.Accordingly, the Plaintiffs requested that its application dated 4th September 2013 to be allowed and that the sought Orders **a, b, c** and **d** be granted.

Submissions by the Respondents

[88] The Respondents filed their submissions on the application dated 4.9.2013 after being pressed by the court to do so. They also filed a Replying Affidavit dated 5th February, 2014. They stated that sometime in May, 2005 Abdul Mohamed and Farid Mohamed who are directors of the first Defendant obtained a loan from the Plaintiff on the terms and conditions agreed by the Principal Debtor and the Plaintiff.The Defendants were the guarantors of the said loan and the said loan was advanced as an individual loan for the benefit of the Principal Debtor and at no single time was the loan advanced for the benefit of the Defendants. They further asserted that, they filed an objective defence which raises weighty traible issues and transverses all necessary allegations in the Plaint.They stated that the following information is important, that;

a. Sometimes in 2009, the Principal Debtor assigned from directorship of the 1st Defendant and pursuant to their resignation, the Principal Debtor on 15th December, 2009 acknowledged that the loan advanced to them remained. The Principal Debtor and the 1st Defendant or the 2nd or 3rd will not be held responsible for the loan.

b. The Plaintiff has been in communication with the Principal Debtor and there have already been a couple of informal meetings between the Plaintiffs' representatives and the Principal.

[9] They contended that the application is incompetent and bad in law. It is incurably defective and does not lie further. It is also frivolous, vexatious and otherwise an abuse of the court process. The Defendant filed a substantive defence and should not be adjudged arbitrary without being heard. They argued that the statement of defence fully complies with Order 7 of the Civil Procedure rules and discloses the following triable issues.

1. The loan was taken by the Principal Debtor.
2. Legal Principal is to follow up on the debt.
3. There was no board resolution that was passed.

[10] They relied on the case of **Samuel KanyiGitonga vs. James Chege & others; Civil Suit No. 3356 of 1989**; the **oxygen principle;** literary work***A Practical Approach to Effective Litigation,*** **sixth Edition** whose cumulative effect is that striking out a defence is a draconian measure which should be exercised sparingly and only on clearest of cases that cannot be resuscitated by amendment. A more practical approach is to in dealing with a case justly includes, so far as is practicable-

a. Ensuring that the parties are on an even footing
b. Saving expense
c. Dealing with the case in ways which are proportionate to:-

i. The amount of money involved
ii. The importance of the case.
iii. The complexity of the issues;

The court should be guided by the fact that summary rejection of the defence violates the oxygen principle. In this matter, the Defendants argued that they are all the guarantors of the loan and as such the Plaintiff owes the court a duty to prove that indeed there were efforts to trace the Principal Debtors who took the loan. The loan agreement was effected as between the Principal Debtors and the Plaintiff.The Defendant has no intention of delaying the trial. See the case of Bank of Baroda (K) vs Altec System (2013). It was held that the power of the court to strike out pleadings should be exercised sparingly. Consider also that striking out the offending pleading should observe these principles:

i. That parties will not highly be driven from the seat of judgment and.
ii. A stay or even dismissal of proceedings may often be required by the very essence of justice to be done, so as to prevent the parties being harassed and put to expense by frivolous, vexatious and hopeless litigation.

[11] The overriding objective and article 159(2) (d) of the Constitution will not allow a technicality to be used to override substantive justice. On the above seethe case of **DT Dobie & Co;Nitin Properties vs Jagir Singh KalsiNRB CA 132/1989 (unreported);** the case of **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil application No Nairobi 263 of 2009**; and the case of**Yumna Ali & Others vs. Muhidin Ali & Another Civil Application No 2 of 2013**. According to the Respondents, striking out of the defence would be unjust and would occasion an injustice on the defendants. In the circumstances of the case, the defence raises triable issues and as such the plaintiff's application should be set aside or dismissed.Ideally, cases should be determined on tested evidence at trial. The bottom line cannot be better set than in the words of Fletcher Moulton L.J. in**Dyson Vs. Attorney General [1911] 1 KB 410 at 418** when he delivered himself thus;

> **"To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad".**

DETERMINATION

[12] I need not re-invent the wheel. Striking out of pleadings is a draconian measure which should be imposed on clearest of cases. In case of an application to strike out a defence, a clear case is one where the defence is a sham, an assembly of bare denials; a mere demurrer which is but just a waste of court's time. But it should be easily discernible from the pleadings that the

defence is a sham or merely infested with mere denials. It should not require much probing or copious explanations to ascertain the defence is mere sham. However, if a defence raises even a single bona fide triable issue in the sense of the Sheridan J's Test, the court should not hesitate to allow the defendant to defend the case and decline summary striking out of the defence. There is ample judicial authority on this subject and I will not multiply them.

[13] Applying this test, are issues in the defence bona fide triable issues which merit a trial. The major arguments are; 1) that the Defendants are guarantors of a loan advanced to third parties and they are not liable at all to pay the loan. In any event, the guarantee is based on a non-existent loan and they did not seek independent legal advice when they signed the guarantee; 2) that there was no resolution of the company to incur the loan in issue; 3) that the Plaintiff must prove a loan was given to the 1st Defendant; and 4) that the principal debtor defaulted. These purported issues should be weighed against the law and the clear documents before court. Documents availed show that the 1st Defendant is the borrower and the 2nd and 3rd Defendants are guarantors to the borrower. One surprising thing is that the 1st Defendant was a director of the company and was also a signatory to the 1st Defendant's account which was overdrawn and gave rise to the debt in issue. Similar arguments were advanced in support of an application for joinder of the purported third parties on the basis that they were the principal borrowers. The court ruled that:

> **''The documents provided show that the account on which the overdraft was drawn is the Company's and the account was opened for and on behalf of the company. The agreement of guarantee was executed by the 2nd and 3rd defendants as guarantors of the facility to the company. The Plaintiff was careful that they committed the 2nd and 3rd defendants in the guarantee to both as guarantors and primary obligor. All these legal instruments point to only one thing; that the principal debtor is the 1st defendant and no the intended defendants''.**

These issues were determined in the said ruling dated 21st day of November 2014. Let me repeat for emphasis that, this is a suit against guarantors and is based on the guarantee which is quite separate from the borrower's contract. I stated in the other ruling and I will repeat it here that the claim that the debt belongs to other third parties other than the company should be resolved between the Defendants and the third parties through third party proceedings which the Defendants seem to have initiated but abandoned on the way. As long as the Defendants have not sought for contribution or indemnity from the alleged third parties, arguments or a defence founded on the argument that the defendants are not liable as borrowers and guarantors will not hold as against the lender. In other words it is not a defence worth any adjudication by the court.

[14] Again, internal processes or working of the company are not to be used against third parties without notice and who have dealt with a company in good faith. See the **Torquands Case** thus;

> **"...internal management rules cannot bind a third party unless they are brought to its notice".**

See what the court stated in the ruling mentioned above, that;

> **''I agree with the argument by the plaintiff that the minutes relied upon by the defendants were internal communication of the company and which do not bind the plaintiff or constitute a contract between the plaintiff and the third parties''.**

It bears repeating that the company is not a Guarantor as argued by the Defendants and so the following submission by the Defendants is misplaced;

> **''Oncareful examinationof the Memorandum and Articles of Association it does not provide for the company being a guarantor of another party.However, even if the**

same were to be the case it would need a minimum of two directors to sign the instrument of guarantee. ''.

[15] Similarly, the 2nd and 3rdDefendants cannot feign ignorance of the nature of guarantee they were signing. Such defence is not available to the 2nd and 3rd Defendants who have not shown that they signed the guarantee when they were labouring under a fundamental misapprehension about the substance of the document. They were expected to have taken all due care and counsel before signing the guarantee. These are not illiterate persons but literate adult in full possession of their faculties. In fact the 2ndDefendant was a director of the company at one time or other. Both signed the guarantee which they do not deny save on the reasons which I have dismissed.Therefore, they are bound by the terms of the guarantee. Their arguments that they cannot be liable at all and that the principal debtors should be located may as well engage auto-pilot gear to the air space of principal obligor. See clause 4 of the Guarantee which describes the two Defendants as primary obligors and not merely as sureties. This has serious implications on their arguments that they are no liable at all to pay the debt.

[16] The other purported triable issue that the company never applied for a loan is neither here nor there. I have dismissed the argument that they signed the guarantee without sufficient advice. Moyez is not candid enough as he was a director at the time of opening the company account in issue which was overdrawn. The debt consists in the overdraft which by necessary implication is deemed to be a request for loan. No amount of arguments that canconvert the argument that there was no application for loan when the company allowed its account to be overdrawn into a *bona fide* triable issue worth trial. All in all, it is easy to tell that the defence being raised is a mere sham which is intended to prolong the wait on the part of the Plaintiff to realize his judgment. Accordingly, although striking out is a draconian measure, if it is the only lawful course a court can take in a matter, it should take it despite the unpleasant nature of it thereof. I find that there are no triable issues raised in the defence; the defence is mere sham and I strike it out. I allow the application dated 4th September 2013 and enter judgment as prayed for in the plaint. It is so ordered.

Dated, signed and delivered in court at Nairobi this 30th day of June 2015.

F. GIKONYO

JUDGE