IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 766 OF 2012

AFRICA EDGE SARI ……..……. PLAINTIFF

VERSUS

SUPINDER SINGH SOIN …… DEFENDANT

RULING

1. The Notice of Motion brought by the Defendant before this Court was dated 10th September 2013 and seeks Orders that this suit be struck out with costs to the Defendant. The same is brought under the provisions of **Order 2 rule 15 (c) and (d)** of the *Civil Procedure Rules* as well as **section 3A** of the *Civil Procedure Act*. The main ground in support of the Application was that the suit was time barred. The second ground was that the Court lacked jurisdiction to hear and determine the same as the contracting parties had reserved jurisdiction under their contract to the Courts of Brussels, Belgium. Further, the Defendant maintained that it was a stranger to the Plaintiff there being no privity of contract as between them. Finally the alleged foreign judgement given against the Defendant by the Courts of Belgium could not be a cause of action in this suit by dint of the provisions of **section 9** of the *Civil Procedure Act*.
2. The Application was supported by the affidavit of **Dr. Supinder Singh Soin**, the Defendant, sworn on 10th September 2013. The deponent maintained that he was a stranger to the person of the Plaintiff as a contract that he entered into was between him and an entity called Banque Belgolaise of Belgium ("the bank)". He was not privy to any assignment between the bank and the Plaintiff. In any event, the contract as between him and the bank as per letters dated 10th June 1997 and 5th August 1997, which he annexed to his said Affidavit, specifically gave the jurisdiction of any dispute as between the parties to be governed by the laws of Belgium and handled in the Courts of Brussels. Finally, the deponent maintained that the suit was time barred as even if he had admitted the debt vide a letter dated 28th March 2000, this suit should have been filed on or before the 27th March 2006, the limitation period under the Limitation of Actions Act for contract being 6 years. The suit was obviously filed out of time.
3. The Replying Affidavit of the Plaintiff was sworn by the manager of its investment fund activities one **Hatim Allan Elamin** dated 27th February 2014. The deponent attachedh is Statement of Evidence filed herein on 17th December 2012 and he confirmed the contents of the same as true. He noted that by an assignment dated 26th December 2007 of the bank has assigned to the Plaintiff the debt due from the Defendant. He annexed a copy of the assignment as an exhibit to the Replying Affidavit marked "B". The deponent further went on to say that on 22nd July 2008, the Plaintiff had filed suit as against the Defendant in the Brussels Commercial Court. The summons thereof was served on the Defendant on 8th December 2008. Again he annexed copies

of the Brussels Commercial Court documentation to his said Affidavit. Mr. Elamin commented that the Brussels Commercial Court had entered judgement in favour of the Plaintiff as against the Defendant for the sum of Euros 341,155.74 on 19th November 2009. That sum attracted interest at the rate of Euros 41.12 per day from 1st August 2008 until payment, with costs put at Euros 1849.10. He noted that the Plaintiff was suing on the Belgian Judgement. The Plaintiff had obtained a sworn statement from Prof. Dr. Hakim Boularbah, an attorney at law at the bar of Brussels, Belgium which answered the questions relating to Belgian law and procedure which had been raised by the Defendant. The deponent attached a copy of such sworn statement to his said Affidavit marked as exhibit "C".

4. The Plaintiff also filed Grounds of Opposition dated 27th February 2014. Such grounds detailed as follows:

> **"1. The suit is not time barred under Kenyan law or Belgian law.**
>
> **2. The Kenyan courts have jurisdiction to hear and determine a suit brought on the judgment delivered by the Belgian courts.**
>
> **3. The debt due from the defendant to Banque Belgolaise SA was validly assigned to the plaintiff and the assigned debt is the subject of a conclusive judgment delivered by the Brussels Commercial Court in Belgium.**
>
> **4. The judgment of the Brussels Commercial Court is conclusive under Section 9 of the Civil Procedure Act.**
>
> **5. The Plaint will not prejudice, embarrass or delay the fair trial of the suit and is not an abuse of the process of the court.**
>
> **6. The matters set out in the affidavit of Hatim Allan Elamin and the sworn Statement from Prof Dr. Hakim Boularbah annexed thereto.**
>
> **7. There is no basis for striking out the suit".**

5. With the leave of the Court, the Defendant filed a Supplementary Affidavit on 8th April 2014. He maintained that he was a stranger to the deponent to the Replying Affidavit sworn on 27th February 2014. That person was also a stranger to the Plaintiff and the suit as no authority under Seal was exhibited both in the Replying Affidavit or the verifying affidavit to the Plaint. As a result the Plaintiff's legal being was not therefore established. The deponent went on to say that paragraphs 3 to 9 of the Replying Affidavit were irrelevant to the Application before court because the same sought to strike out the suit on the basis that the Court lacked the jurisdiction to hear and determine the matter as the contract documents reserved the jurisdiction to the Brussels Courts, Belgium. In any event, it was the Defendant's contention that the suit was time barred under Kenyan law and whether or not Belgian law provided for a longer limitation period was irrelevant. Further, the Defendant had been advised by his advocates on record that the alleged Judgement in Brussels could not form the basis of an action in Kenya because it was inconclusive within the understanding of Kenyan law and was unenforceable in Kenya. Further, if the Plaintiff was seeking to base its case on the supposed judgement obtained in Brussels, it ought to have moved this Court to adopt the said Judgement rather than file this suit. Finally, the Defendant maintained that the statement made by Prof. Dr. Hakim Boularbah was irrelevant to these proceedings and to his contentions in this suit.
6. The Defendant's skeleton submissions were filed herein on 8th April 2014. The Defendant pointed to the celebrated case of **D. T. Dobie & Co (Kenya) Ltd v Muchina (1982) KLR 1** in which the Court of Appeal had pointed out that the power to strike out ought to be applied very sparingly but as such powers were granted by statute, this Court would and could exercise the same from time to time. It would be exercisable in very plain cases and the Defendant maintained that this was one of such cases. The Defendant pointed out that under **section 4** of the *Limitations of Action Act*, an action based on contract could not be brought after six years from the date of the cause of action.

There was no dispute between the parties that the matter in hand was based on contract. The Defendant had noted that at paragraph 4 of the Plaint, the Plaintiff had detailed that by a letter dated 28th March 2000, the Defendant had admitted his indebtedness to the bank. If so, then the cause of action arose on 28th March 2000 and lapsed six years thereafter. As a result, under Kenya Law the Defendant submitted that the action was consumed and forever buried on or about 27th March 2006. The Plaintiff had filed this suit in Kenya on 17th December 2012 almost 12 years from the date of acknowledgement of the debt. In the Defendant's view the Plaintiff's case was completely hopeless and could not even be cured by amendment.

7. As regards jurisdiction, the Defendant commented that the Plaintiff was blowing hot and cold, approbating and reprobating at the same time. The contract produced by the Plaintiff donated jurisdiction to the Courts of Brussels, Belgium and the governing laws were reserved to be the laws of Belgium. The Defendant's position was that both parties had decided upon the governing law and jurisdiction, and consequently no Court without jurisdiction could intervene either in the enforcement of a Judgement from the chosen court or to interpret the governing law. The Defendant submitted that the Plaintiff, if it had judgement from Brussels, must either seek to enforce the judgement as a foreign judgement pursuant to the provisions of *Cap 43, Laws of Kenya* or alternatively, to execute its judgement against the Defendant should the latter find himself within the jurisdiction of the Brussels Court. A brief look at the provisions of *Cap 43* precluded the Plaintiff from instituting enforcement proceedings in Kenya firstly, because the judgement was not final and conclusive and secondly, Belgium was not a reciprocating country. Even if the Judgement was enforceable, the provisions of *Cap 43* **(section 5)** prescribed the procedure to be adopted in enforcement proceedings and that was not by way of Plaint which the Plaintiff had proceeded with. As regards jurisdiction, the Defendant referred this Court to the cases of **Owners of Motor Vessel "Lillian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1** as well as the case of **Samuel Kamau Macharia & Anor. v Kenya Commercial Bank Ltd & 2 Ors (2012) eKLR**.
8. The Defendant then made submissions as regards the application of **section 9** of the *Civil Procedure Act*. Having set out **section 9**, the Defendant submitted that it was inescapable but to conclude that the Plaintiff's alleged judgement from the Court in Brussels was not conclusive. Firstly, it had not been given on its merits and secondly, it sustained a claim founded in complete breach of the provisions of the Limitation of Actions Act having been filed more than six years since the acknowledgement of the debt made on 28th March 2000. In the Defendant's view, the cause of action must be founded and the case must proceed in observance of all laws applicable in Kenya. Whether or not the limitation period in Belgium was 10 years or otherwise was of no relevance in relation to the breach of Kenyan law. As the Claim was time barred and the Judgement was unenforceable under the Civil Procedure Act, the Defendant concluded that this suit must be struck out.
9. Finally, the Defendant submitted in relation to privity of contract. The Plaintiff had claimed that the bank had assigned its contract to it. The Defendant did not know as to the Plaintiff's legal entity as no evidence had been produced as regards the same. The Defendant noted that the verifying affidavit was sworn by the same person who swore the Replying Affidavit herein and gave his address in Khartoum, Sudan. The Defendant had understood that the Plaintiff was a company doing business in Europe. In any event, it was the Defendant's submission that an assignment of a contract must be acceded to by all the parties to the same. It quoted from **Halsbury's Laws of England 4th Edition paragraph 329** as follows:

"the doctrine of privity of contract is that, as a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is, parties who are not parties to it. The parties to a contract are those persons who reach agreement….".

The Defendant thereafter referred this Court on this point to the cases of **Muchendu v Wauta (2003) KLR 419, Alsafra Health Care Ltd v Kam Pharmacy & 2 Ors HCCC No. 261 of 2001 (unreported)** as well as **Chitty on Contracts paragraph 18-014** which detailed:

"the doctrine of privity (of contract) means and means only, that a person cannot acquire rights, or be subject to liabilities arising under contract to which he is not a party."

10. The Plaintiff's submissions in relation to the Defendant's said Application to strike out the Plaint, were filed on 30th April 2014. The Plaintiff submitted that the principles to be applied under **Order 2 rule 15 (1)** relied upon by the Defendant were set out in the Judgement of the Court of Appeal in the **D. T. Dobie** case aforesaid. These were that:

> **"a. The Court should not strike out if there is a cause of action with some chance of success.**
>
> **b. The power should only be used in plain and obvious cases and with extreme caution.**
>
> **c. The power should only be used in cases which are clear and beyond all doubt.**
>
> **d. the Court should not engage in a minute and protracted examination of documents and facts.**
>
> **e. If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward".**

The Plaintiff went on to refer this Court to the authorities of **Dr. Murray Watson v Rent-A-Plane Ltd HCCC No. 2180 of 1994 (unreported), Lynette Oyier v Savings & Loan Kenya Ltd HCCC No. 891 of 1996 (unreported)** and **Bank of Credit and Commerce International (Overseas) Ltd v Giorgio Fabrise & Anor HCCC No. 711 of 1985**.

11. The Plaintiff thereafter commented upon the Defendant's 5 objections to the Plaint and reviewed the Supplementary Affidavit filed on 8th April 2014. The Plaintiff maintained that the cause of action in the present case was not based on contract but on the judgement obtained in the Brussels Commercial Court. The Plaint set out the Belgian judgement and claimed the amount as detailed therein. The Plaintiff maintained that there were two Limitation periods to consider, the first under Belgian law in respect of the proceedings and judgement before the Belgian Court and the second under Kenyan law in respect of the present proceedings in which the Plaintiff was suing on the Belgian judgement. It noted that the position with regard to Belgian law had been set out in the sworn statement of Prof. Dr. Hakim Boularbah in Exhibit "C" to the Replying Affidavit. That statement demonstrated that the proceedings before the Belgian Court were not time-barred. It maintained that under Kenyan law the limitation period as per **section 4 (4)** of the *Limitation of Actions Act* was 12 years from the date of the Belgian judgement i.e. 19th November 2009.
12. As regards jurisdiction, the Plaintiff noted that the original contract between the Defendant and the bank provided exclusive jurisdiction to the Belgian Courts. It submitted that this only referred to deciding the substantive case relating to any breach or liability. The contractual jurisdiction was exhausted by and merged in the Judgement of the Belgian Court. The Plaintiff maintained that the position taken by the Defendant that the Judgement could only be enforced in Belgian was absurd. That would mean that wherever there was an exclusive jurisdiction clause in a contract, the Defendant could avoid any enforcement simply by removing himself and his assets from that jurisdiction. The Plaintiff noted that the position adopted by the Defendant was that the only remedy for a foreign Judgement to be enforced was under the provisions of Cap 43 – the Foreign Judgements (Reciprocal Enforcement) Act. However, this was not the case and the authorities being **Dicey & Morris on the Conflict of Laws, 13th Edition** as well as **Mulla on the Code of Civil Procedure 15th Edition** showed that:

"a judgement creditor seeking to enforce a foreign judgement in England at common law cannot do so by direct execution of the judgement. He must bring an action on the foreign judgement".

13. The Plaintiff, pointing to the sworn statement of Prof. Dr. Boularbah, noted that the Judgement of the Brussels Commercial Court was not a Kenyan style default judgement entered as an administrative act by a registrar but a judicial hearing at which three judges considered the merits of the case and any argument which they thought the Defendant could have raised, if he had been

present. As a result, the Belgian Court had competent jurisdiction and the Judgement was considered. The Plaintiff concluded its submissions by stating that the Belgian Judgement was a valid judgement which was conclusive under **section 9** of the *Civil Procedure Act*. The Plaint discloses a *bona fide* cause of action based on a conclusive judgement of the Belgian Court. All the Defendant had done was to put forward a series of technical objections, none of which had merit or constituted a valid defence to the Plaintiff's claim.

14. In my view, the parties themselves have identified issues which require determination before Court. On the Defendant's part, those issues in relation to the Plaint include:

a. Whether or not the suit is time barred
b. Whether this Court lacks jurisdiction as jurisdiction in the contract between the Defendant and the bank was reserved to the Brussels Court in Belgium.
c. Whether there is privity of contract between the Plaintiff and the Defendant.
d. Whether the judgement of the Belgian Court can be a basis of a cause of action with reference to section 9 of the Civil Procedure Act.
e. Whether for the above reasons this case will prejudice, embarrass or delay the fair trial thereof and is an abuse of the court process.

Both parties have submitted in relation to questions of limitation, jurisdiction, privity of contract, **section 9** of the *Civil Procedure Act* as well as prejudice, embarrassment or delay in relation to a fair trial. The Plaintiff has submitted that the Plaint herein discloses a *bona fide* cause of action based on the conclusive judgement of the Belgian Court. It maintains that the Defendant has only put forward a series of technical objections. That may be so but, in my view, those objections need to go to trial.

15. Both parties referred this Court to the well-known case of **DT Dobie & Co (Kenya) Ltd v Muchina** (supra). **Madan JA** (as he then was) in that case when he adopted the finding of **Sellers LJ** in **Wenlock v Moloney (1965) 1 WLR 1238** where the learned Judge had this to say:

"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

Further and in the same case, **Danckwerts LJ** detailed:

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading".

Madan JA (as he then was) in the **DT Dobie** case (as above) added his own view as to the matter with striking out:

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it."

16. **Ringera J.**(as he then was) in the **Dr. Murray Watson** case (supra) quoted from the **4th Edition, Volume 36, Halsbury's Laws of England** at **paragraph 73**:

"In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that the absolute

defence exists, the court will strike it out. Its pleading will not however be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading ought to be exercised with extreme caution and only in obvious cases….."

The learned Judge, after adopting the above statement with approval, went on to say:

"The pith and marrow of it is that where on a consideration of only the allegations in the plaint the court concludes that a cause of action with some chance of success is shown then that plaint discloses a reasonable cause of action".

17. I did not glean much assistance from the third authority listed by the Plaintiff that being the **Lynette Oyier & Anor** case (supra) as the circumstances that persisted in that case related far more towards the pleadings being formulated within the established rules rather than a straightforward matter of striking out. However, **Waki J's** finding in the **Bank of Credit & Commerce International** case was very much to the point when the learned Judge detailed:

    "Summary determinations of cases are Draconian and drastic and should only be applied in plain and obvious cases both as regards the facts and the law. In a matter that alleges that the suit is scandalous, frivolous and vexatious, and otherwise an abuse of the court process, I must be satisfied that the suit has no substance, or is fanciful or the Plaintiff is trifling with the court or the suit is not capable of reasoned argument; it has no foundation, no chance of succeeding and is only brought merely for purpose of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the court process where it is frivolous and vexatious."

18. To my way of thinking, the hearing and determination of the Plaintiff's case herein is one which is capable of reasoned argument. It is not for this Court to tread on the shoes of the trial judge nor indeed to usurp his task. There are issues which need to be tried which, in my view, will require *viva voce* evidence to be brought before Court. As a result, I dismiss the Defendant's Notice of Motion dated 10th September 2013 with costs to the Plaintiff.

DATED and delivered at Nairobi this 26th day of June, 2014.

J. B. HAVELOCK

JUDGE