REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

HCCC CASE NO. 219 OF 2013

FIDELITY COMMERCIAL BANK LIMITED..... PLAINTIFF

Versus

GREENWOODS LIMITED .....1ST DEFENDANT

MOYEZ BHANJI.....2ND DEFENDANT

SADRUDDIN BHANJI.....3RD DEFENDANT

And

ABDUL MOHAMED.....PROPOSED 4TH DEFENDANT

FARID MOHAMED.....PROPOSED 5TH DEFENDANT

RULING

Joinder of parties

[1] The application I am to determine is dated 10th March 2014 and it seeks the leave of the court to join two other persons as 4th and 5th Defendants. The two will be referred to as the intended Defendants. The application is brought under Order 1 rule 2, 10(2), Order 51 rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. It is supported by the Affidavit of MOYEZ BHANJI.

[2] The major ground in support of the application is that on 25th May 2005, the plaintiff advanced a loan to the intended defendants. The Defendants agreed to guarantee a loan advanced to the principal debtors on the understanding that the principal debtors will honour all their obligations under the loan agreement with the plaintiff. The principal debtors later refused and or neglected to repay the loan. The principal debtors have sufficient assets and money to repay the loan or which can be attached towards repayment of the loan only that they have deliberately defaulted. The plaintiff has had negotiations with the debtors on the repayment of the loan. Those negotiations have altered the liability of the defendants. Therefore, the Defendants believe any question on liability in respect of the loan herein should be determined among all the parties

including the principal debtors. The principal debtors, according to the defendants are necessary parties to enable the court determine the real issue in controversy among the parties. The defendants fear that should the plaintiff's application to strike out their defence be heard before this one for joinder, they will be adversely affected. They filed elaborate submissions and judicial authorities. These submissions and authorities are on record.

[3] The Plaintiff argued on the other hand, that the 1st defendant is the principal debtor while the 2nd and 3rd defendants were guarantors to the facility advanced herein. The 1st defendant was the holder of account number 11104061 on which an overdraft facility was allowed by the agreement of the parties. The facility accumulated to Kshs. 12,833,733 and only part of the money was paid leaving a balance which is the subject of this case. According to the Plaintiff, the 2nd and 3rd defendants were not only guarantors but also assumed ''the primary obligor'' as per clause 4 of the Guarantee. The defendants cannot therefore shift their obligations as principal debtor and guarantors of the facility to third parties. The application for joinder should, therefore, be dismissed with costs. The plaintiff also filed elaborate submissions and judicial authorities.

[4] The intended defendants resisted their being joined in the suit on similar grounds like those advanced by the plaintiff. They only added that they resigned from directorship of the company and transferred their entire shareholding in the company to the 2nd and 3rd defendants. They were discharged from any liability whatsoever with regard to the company as shown in the minutes for the company for the meeting held on 15th December, 2009. They submitted that the loan and liability thereof were the company's as a distinct legal entity in law. There was no privity of contract between the plaintiff and the intended defendants on the loan advanced to the company. They filed elaborate submissions as well and filed judicial authorities.

THE DETERMINATION

Issues

[5] The issues here are twofold but of the same coin; 1) whether the intended defendants are necessary parties in the suit; and 2) whether they should be joined. But in determining the broader issues formulated above, the court will determine who the principal debtor is in light of the relevant law on mortgages and guarantor as well as the greatest legal innovation in company law; corporate legal entity.

[6] I have considered all the submissions of the parties and the judicial authorities filed herein. I have also considered all the affidavits, annexures thereto and the pleadings filed. The defendants have argued that the principal debtors are the intended defendants herein. The Defendants seem to rely upon the minutes annexed in the bundle of documents by the plaintiff at page 40-42 to the effect that the loan which was given to the intended defendants herein by the plaintiff although in the name of the company would remain the liability of the intended defendants who should settle it directly with the plaintiff bank. The said minutes also stated that the defendants will not be held liable for the loan. The information was to be conveyed to the plaintiff bank. The documents provided show that the account on which the overdraft was drawn is the Company's and the account was operated for an on behalf of the company. The agreement for the overdraft was by 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 not the intended defendants. The primary liability is the company's. 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. At best, those minutes constitute a contract between the company and the intended defendants and should be enforced as such. In law, and this is the guide here- the loan agreement between the plaintiff and the 1st defendant is enforceable against the 1st defendant as the principal debtor,

while that of guarantee between the plaintiff and the 2nd and 3rd defendants is enforced against the two defendants as guarantors. Here, there are two important legal issues; about the distinct nature of contract of guarantee and of loan; and the greatest legal innovation in **Salomon vs. Salomon** becomes important. On the latter, I am content to cite the the decision of the House of Lords and in particular the opinion by Lord Macnaghten that:

> ***'...the company is different person altogether from subscribers… and, though it may be that after incorporation the business is precisely the same as it was before and same persons are managers, and same hand receive the profit, the company is not agent for subscriber or trustee for them. Nor are the subscribers as member liable, in any shape or form, except to the extent and manner prescribed by the Act.'***

And on the former see this rendition in ***Halsbury's Laws of England***, **4th Ed** that**:**

> **Para 101**
>
> ***"A guarantee, being merely an accessory contract, does not, even when under seal, cause a merger with that of the principal debtor's simple contract debt to which it relates……***
>
> **Para 103**
>
> ***"…although sometimes bound by the same instrument as his surety, the principal debtor is not a party to the surety's contract to be answerable to the contract; there is not necessarily any privity between the surety and the principal debtor; they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the surety contracts."***

[7] In view of the above, the other arguments by the defendants that they were guarantors and not sureties for the debt falls by the way side as long as they are founded on the premises that the principal debtors are the intended defendants. Therefore, the distinction made out in the decision of the Supreme Court of Manila in the case of **Estrella Palmeres vs. Court of Appeal & MB Lending Corp** is useful if it is made by the 2nd and 3rd defendants in defence of the suit against them but not in support of this application for joinder based on the arguments I have just settled. The other proposition in the submissions by the defendants that the plaintiff can only recover from the guarantors after it has shown that it has done everything possible to recover from the principal debtor was also made in the mistaken believe that the principal debtor is the intended defendants, but again, it is only apt in the defence by the 2nd and 3rd defendants in the suit. These arguments are not profitable in this application for joinder. As I have already stated, in law a contract of guarantee is quite distinct from the loan agreement- each is separate and enforceable as such. Except, whether the principal debtor and the guarantor can be sued together is a matter of legal arguments which should depend on the facts of each case.

[8] Based on the findings of the court, the intended defendants are not necessary parties in this suit. The proper parties are before court and there is no any deficiency in the parties which will require the joinder of the intended defendants. Issues in controversy relate to the parties before the court and will be completely and effectually determined among the parties in the suit. There is absolutely no legal necessity to enjoin the intended defendants. I note however, that the defendants had commenced the process of third proceedings but they did not follow through on it. Perhaps, third party proceedings may provide some connexion between the defendants and the intended defendants because by its very nature it is intended to resolve liability between the defendants and the intended party without involving the plaintiff. The procedural law on third party proceedings allow directions under order 1 rule 22 of the CPR to be given upon the court being satisfied that there is a proper question to be tried as to liability of the third party, and order such question as to liability between the third party and the defendant to be tried in such manner, at or after the trial of the suit, and the court may enter such judgment against the third party. That

is very different from the joinder being sought to make the intended defendants parties in this suit when the plaintiff says it has no privity of contract with or a claim against the two intended defendants. See the decision of the Court of Appeal on privity of contract in the case of **Kenindia Assurance Company Ltd vs. Otiende (1991) KLR** and **Kenya National Capital Corp Ltd vs. Albert Mario Cordeiro & Another [2014] eKLR.** The other option open to the defendants is to file a separate suit against the intended defendants and prove their claims against them. But still some serious legal hurdles will have to be surmounted in that course of action.

[9] The upshot is that the application dated 10th March 2014 is dismissed with costs.

Dated, signed and delivered in court at Nairobi this 21st day of November 2014

F. GIKONYO

JUDGE