REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 59 OF 2013

DEVELOPMENT BANK OF KENYA LTD .....…….....…… PLAINTIFF

VERSUS

RIVA OILS CO. LTD. ……...……...……...…….. 1ST DEFENDANT

EZEKIEL KARISA KITSAO ……..…….…… 2ND DEFENDANT

SAMUEL KAZUNGU KAMBI ….....……. 3RD DEFENDANT

DAVID KOMEN TUITOEK ….....……..…… 4TH DEFENDANT

R U L I N G

1. Before the Court is a Notice of Motion application by the Plaintiff dated 19th March 2013 and filed on 20th March, 2013. The application is brought under the aegis of **Sections 1A, 1B and 3A** of the *Civil Procedure Act* and **Order 36 Rules 1 & 9** of the *Civil Procedure Rules*. The applicant seeks the following prayer:

> **"1) THAT the Honourable Court be pleased to enter summary judgment against the 2nd and 4th Defendants jointly and severally as prayed in the Plaint.**

The ground upon which the Applicant relied in its application are simply that the 2nd and 4th Defendants are truly indebted to the Plaintiff to the tune of Kshs. 304,906,835.40 as at 28th February, 2010 plus interest at 17% from the same date. It is the Applicant's contention that the 2nd and 4th Defendants have failed and/or neglected to settle the outstanding debt despite demands made and have filed no defence to the suit.

2. The application is supported by the Affidavit of **Olga Sechero** sworn on 19th March, 2013. The deponent avers that the Defendants are jointly and severally indebted to the Plaintiff in the sum of Kshs. 304,906,835.40 which amount continues to accrue interest at the rate of 17% p.a. from 28th February, 2010. In the said Affidavit, the deponent sets out the genesis of the amount claimed, commencing with the offer made to the 1st Defendant on 11th January, 2007 for the borrowing of Kshs. 60,000,000/- secured by a Charge over its property **L.R Number 12785**, a Debenture over the 1st Defendant's assets and personal, irrevocable and unconditional guarantees to be given by the 2nd, 3rd and 4th Defendants. It was further deponed that on 4th July, 2007, the 1st Defendant

made a second application for Kshs. 190,000,000/- secured by a further charge over **LR Number 12785**, a supplemental Debenture and further personal, irrevocable and unconditional guarantees by the 2nd, 3rd and 4th Defendants. The deponent contends that the 1st Defendant was suddenly closed down, without any notice to the Plaintiff, thereby necessitating the demand for the outstanding debt from the guarantors i.e. the Defendants. The Plaintiff relied on the cases of **National Bank of Kenya Ltd v David Mwaniki Kinuthia [2004] eKLR**, **The Industrial and Commercial Development Corporation v Daber Ltd, Civil Appeal No. 41 of 2000 (unreported)**, **Ebony Development Co. Ltd v Standard Chartered Bank Ltd [2008] eKLR**, **Diamond Trust Bank Ltd v Dalip Singh Dhanjaj & Others, H.C.C.C No. 1755 of 2000 (unreported)** and **Jagdish Patel t/a Tansavo v Dr. M.A Fazil, H.C.C.C No. 1544 of 2000 (unreported)** in support of its claim.

3. In opposing the application, the 2nd & 4th Defendants filed Grounds of Opposition dated 16th April, 2013. The 2nd & 4th Defendants contend that they are not the principal debtors but guarantors and that the Plaintiff had not tried to first recover the debt from the principal debtor i.e. the 1st Defendant. In any event, the 2nd Defendant had given instructions to his advocates to have the charged property i.e. LR Number 12785 subdivided and his proportionate share sold to repay the debt. It was also their contention that the Plaintiff has not provided them with proper statements of account and further, the instant application does not satisfy the requirement for grant of such orders.
4. The applicant seeks for summary judgment to be entered against the 2nd and 4th Defendants, jointly and severally for the amount of Kshs. 304,906,835.40/- which continues to accrues interest at the rate of 17% p.a from 28th February, 2010. It is the Applicant's claim that the same arises from breach of contractual terms by the said Defendants, of the terms of loan agreements entered into in or around 2007. The claimed amount is derived from the breach of repayment by the 1st Defendant of the principal amount of Kshs. 250,000,000/-, which facilities were accepted by the Defendants after letters of offer for Kshs. 90,000,000/- and 160,000,000/- were put forward by the Plaintiff on 11th January, 2007 and 26th July, 2007 respectively.
5. In the bundle of documents filed together with the Plaint dated 18th February, 2013, the Plaintiff vide letters dated 17th March, 2010 and 10th July, 2011 made demands of the 2nd & 4th Defendants for the repayment of the loan facilities offered. In the same bundle of documents, there are personal guarantees executed by the 2nd & 4th Defendant dated 27th February, 2007 and 3rd August, 2007. There is also enclosed therein the Bank Statement of Account in the name of Riva Oils Co. Ltd, the 1st Defendant herein as well as being the principal debtor. At the hearing of the Application on 29th April, 2013, Mr. Kiruki for the Plaintiff submitted that it had established its liquidated claim against the 2nd and 4th Defendants, and had thus satisfied the conditions set out under **Order 36 Rule 1**. He referred the Court to the case of **National Bank of Kenya Ltd v David Mwaniki Kinuthia** (supra) in which Waweru, J reiterated the proving of a liquidated claim by the Plaintiff that had not been refuted by the Defendant. In his determination the learned Judge held *inter alia*:

> **"From the material placed before me I am satisfied that the Defendants are truly and justly indebted to the Plaintiff in the sum of Kshs. 1,500,000/- plus interest thereon as contracted. The amended defence raises no triable issues in regard to that sum. Nor has it been shown by the Replying Affidavit or submissions of the learned counsel for the defendants that they should have leave to defend the suit. I will therefore enter judgment for the Plaintiff against the Defendant jointly and severally for the sum of Kshs. 1,500,000/- with interest thereon at 23% per annum from 26th February, 1998 until payment in full."**

It was Mr. Kiruki's submission that the 2nd and 4th Defendants had not filed any Defence neither was there any Replying Affidavit filed to show that indeed the amount claimed was contested.

6. Counsel for the 2nd and 4th Defendants, Mr. Mbogori relied on the Grounds of Opposition and

submitted that indeed his clients were only guarantors. It was his submission that the Plaintiff had not shown what steps it had taken to enforce and recover the debt against the 1st Defendant and that, therefore, the application against the 2nd and 4th Defendants was premature. It was his contention that the Grounds of Opposition raised triable issues and that the Plaintiff has not submitted or provided statements of account to show what the Defendants owe.

7. After careful consideration of the Plaintiff's application dated 19th March, 2013, as well as the 2nd and 4th Defendants' Grounds of Opposition and oral submissions made by Counsel for the parties on 29th April, 2013, it is for this Court to make a determination on whether the application is merited as against the 2nd and 3rd Defendants. The 1st Defendant had defaulted in repaying the loan facilities extended to it on diverse dates as enumerated hereinbefore. In trying to follow up on the repayments, the Plaintiff found out that the 1st Defendant had closed down its operations, leaving the Plaintiff with great and eminent loss. Given that the amounts claimed are colossal, it followed that the Plaintiff was left with no alternative but to chase the 2nd and 4th Defendants as the guarantors who had given irrevocable, personal and unconditional guarantees to repay the loan facilities.
8. In the guarantee documents signed by the 2nd and 4th Defendants dated 27th February, 2007 and 3rd August, 2007 respectively, they gave an irrevocable guarantee to repay the loan facilities extended to the 1st Defendant. Pursuant to Clause 1(a) of the Guarantee and Indemnity which they duly executed, it was incumbent upon the Plaintiff to call upon the 2nd and 4th Defendants to repay the loan facilities when they fell due with regard to the circumstances leading to the 1st Defendants failure to remit the same. The specified Clause reads in part:

> **"1(a) *I shall pay and satisfy the bank on demand* (limited to the maximum amount specified in Clause 3 below) all sums of money which are now or at any time after this date shall be owing to the Bank anywhere on any account whatsoever whether from the customer solely or from the customer jointly with any other person or persons or from any firm in which the customer may be a partner including the amount of notes or bills discounted or paid and other loans, credits or advances *made to or for the accommodation of either the customer solely or jointly or any such firm as aforesaid or for any moneys for which either the customer solely or jointly or any such firm may become liable as surety or for any moneys or other facilities guaranteed by the Bank for and on behalf and at the request of the customer solely or jointly or any such firms or in any other way whatsoever together with all cases aforesaid all interest (at such rate or rates as may be from time to time be charged to or payable by the customer under the arrangements from time to time in force between the customer and the Bank)* discount and other banker's charges including legal charges as between advocate and client occasioned by or incidental to this or any other security held by or offered to the Bank for the same indebtness or by or to the enforcement of any such security and including;…"** (Underlining mine).

9. It therefore falls upon the 2nd and 4th Defendant being the guarantors of the 1st Defendant (who has since closed shop), to satisfy the loan facilities extended to it to the limit of their respective Guarantees plus any other charges incidental to or occasioned from the loan agreement, including any interest, fees and charges. In following the case cited by the Plaintiff i.e. **Ebony Development Co. Ltd v Standard Chartered Bank Ltd** (supra) Khaminwa, J on delivering on the issue of the liability of guarantors held that:

> **"The security of charge was a guarantee. The obligation of a guarantor is clear. It becomes liable upon default by the principal debtor. The charge concerning this matter is the second charge updating the indebtedness of the borrower. It is not the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum."**

10. The Plaintiff seeks summary judgement to be entered against the 2nd and 4th Defendant. The

parameters under which such an application is made fall under the purview of **Order 36**, to which an applicant has to establish a liquidated amount. The Applicant has to the extent of the provisions of the said Order, endeavored to establish the 2nd and 4th Defendants indebtedness to it. It has adduced evidence of all the agreements that had been entered into between itself and the aforementioned Defendants, the documents of Guarantee and Indemnity and the demand letters sent to the 2nd and 4th Defendants. To the Courts mind, this is sufficient evidence to which the Court can conclusively make an informed determination of the matter. From the evidence adduced, it is clear that indeed the agreements were entered into by the concerned parties. The 2nd and 4th Defendants have not comprehensively denied that indeed they were in contractual agreement with the other parties. They have not filed any Defence or Replying Affidavit challenging the allegations and claims made by the Plaintiff. The only document that they have relied upon to deny these averments was the Grounds of Opposition. In my opinion, such do not raise any triable issues as portended by Mr. Mbogori learned counsel for the 2nd and 4th Defendant. The purpose of such an application as this one before Court, as reiterated in the decision in **Richard H Page & Associates Ltd v Ashok Kumar Kapoor** [1979] KLR 246,by Chesoni, J (as he then was), is that it enables a Plaintiff to obtain a quick judgment where there is plainly no defence to the claim. Accordingly, the Plaintiff having established its liquidated claim and in the absence of any Defence being filed by the 2nd and 4th Defendants, the application is allowed as prayed for in terms of the prayers of the Plaint filed on 19th February 2013. Costs are awarded to the Applicant.

DATED and delivered at Nairobi this 19th day of June, 2013.

J. B. HAVELOCK

JUDGE