REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Commercial Civil Case 43 of 2010

CMC MOTORS GROUP LTD……..……PLAINTIFF

VERSUS

1. BENGERA ARAP KORIR

T/A MARBEN SCHOOL …….....…….……1ST DEFENDANT

2. ST. ELIZABETH ACADEMY…….....……..….2ND DEFENDANT

RULING

1. This is an application for summary judgment jointly and severally against the Defendants in the amount of Kshs. 4,243,390.80. It is brought by the Plaintiff on the following grounds:

"1. The Plaintiff has prayed for Kshs. 4,243,390.80 from the Defendants jointly and severally.

2. The Defendants have acknowledged the existence of the debt.

3. The defendants have also acknowledged that the debt is payable by them.

4. These admissions by the defendants are well documented and there is nothing left for guessing.

5. As against the Plaintiff, the defendants have raised any triable issue.

6. None of the defendants has filed a cross-action.

7. The defence by the defendants should be struck out and judgment be entered as prayed for in the plaint."

2. The application is supported by the Affidavit of Titus Mbiti, the Plaintiff's Chief Accountant, Coast Region. He has deponed that having seen the defence of the 1st and 2nd Defendants, the 1st Defendant has acknowledged the existence of the debt, whilst the 2nd Defendant acknowledges the existence of a letter dated 8th July, 2009 alluding to a list of debts which the 1st Defendant would settle. He also depones that the 2nd Defendant wrote a letter confirming the debts it would settle including that of the Plaintiff.

3. The 1st Defendant in his Replying Affidavit avers that there are triable issues in his defence, mentioning in particular the agreement between the 1st and 2nd Defendant to take over the 1st Defendant's liabilities; the fact that the Plaintiff was fully aware of the sale agreement between the Defendants; that the 2nd Defendant took over the entire debt of the 1st Defendant, that the 2nd Defendant was not a guarantor of the 1st Defendant; that the 2nd Defendant alone is the debtor and not the 1st Defendant; and that the application should be dismissed as against the 1st Defendant.

4. The application was heard on 15th March, 2012 and oral submissions were made. Ms. Umara appeared for the Plaintiff/Applicant and Mr. Masika appeared for the 1st Defendant. The 2nd Defendant was unrepresented, its previous counsel having been granted leave to cease acting and having served notice of the same on the 2nd Defendant.

5. The Applicant relied on its Plaint and the Sale Agreement between the 1st and 2nd Defendant. According to the Plaintiff, the 1st Schedule to the Agreement shows a list referred to as "**Debtors**" at page 98 of the bundle of documents annexed to the Supporting Affidavit of Titus Mbiti. Item 15 thereon is a debt of Kshs. 4,243,390.80 That list was, allegedly made pursuant to paragraph 4 of the sale agreement which reads as follows:

"4. The Purchaser shall in addition to the purchase price provided in Clause 1 above, pay off all the creditors of the Vendor with respect to both Marben School-Miritini and Marben School-Bombolulu as at 10th February, 2009, approximated at a total of Kenya Shillings twenty five Million (Kshs. 25,000,000) and more particularly as set out in Schedule II of this Agreement (hereinafter referred as the Vendor's Creditors). If for any reasons whatsoever, the debts are over and above the estimated Kshs. 25,000,000 as per the Schedule herein, the amounts in excess shall be paid by the Vendor himself."

6. The Applicant asserts that the Defendants have not denied the debt, and the only question is who between the two of them should pay. Counsel relies on the following authorities:

a) **HCC 214 of 2005 Thompson (K) Ltd vs Air Kenya Aviation Ltd** 2006 e KLR HCC 214 of 2000 for the proposition that:

"it is settled that the procedure of summary judgment is to be resorted to in respect of liquidated demands only where it is plain and obvious that the Defendant is truly and justly indebted to the Plaintiff and there are no *bona fide* ***triable issues raised by the proposed defence already on record."***

b) **HCC 40 of 2004 Kobil Petroleum Limited vs Marsmann and Co. Ltd** [2005] e KLR where the Court said that summary judgment, unlike striking out pleadings, is a procedure where only the Court upon examining the Plaintiff's application decides on the evidence placed before it by either affidavit or otherwise that the defence, even if arguable, is not sustainable.

7. The Respondent/1st Defendant, through Mr. Masika, on his part says that the suit should never have

been brought against him as the agreement clearly stated that the debt was to be paid by the 2nd Defendant. Thus, this application being for judgment "**jointly and severally"** cannot stand. Counsel said that the issue that will arise at the trial will be whether the 2nd Defendant was a guarantor of the 1st Defendant.

8. I have carefully perused the application and the documents availed in relation thereto, and have considered the counsels' submissions and authorities herein.

In my view, the starting point is the pleadings. The plaint at Paragraph 5 states:

"4. As at 1st May, 2009, the 1st Defendant was indebted to the Plaintiff in the sum of Kshs. 4,243,390.80 (hereinafter "the Debt").

5. While the debt was subsisting the 1st and 2nd Defendants entered into a sale agreement in which:-

a) The assets of Marben School were to be taken over by the 2nd Defendant.

b) The debt was to be settled by the 2nd Defendant

c) The 2nd Defendant took possession and ownership of Marben School. This arrangement was done with full consultation with the plaintiff."

9. The 2nd Defendant's defence in response states:

"4…. The 2nd Defendant denies all and singular the allegations contained and particularised [in paragraph 5 of the plaint] and more specifically the allegation as set out at paragraph 5b, to the effect that it had been agreed the 1st Defendant's debt would be settled by the 2nd Defendant and further the allegations set out at paragraph 5 c of the Plaint to the effect that the 2nd Defendant took possession of the 1st Defendant's School with an arrangement that was allegedly done with purported full consideration with Plaintiff."

10. The 1st Defendant's defence on this point states:

"2. The 1st Defendant does admit the contents of paragraph 4 and 5 of the Plaint

3 ….

4. The 1st Defendant state that since the Plaintiff was involved when the subject matter was sold and it was agreed that the Plaintiff's debt was to be settled by the 2nd Defendant, the Plaintiff in these (sic) scenario is stopped by law from filing a suit against the 1st Defendant."

11. In my view, the 2nd Defendant has made no admissions in the defence and has challenged the Plaintiff's understanding of the Sale Agreement. The 1st Defendant's defence, however, has admitted the Plaintiff's assertions, directly implicating the 2nd Defendant as owing the debt as claimed.

Having carefully perused Paragraph 4 of the Sale Agreement, my view is that whatever debt was payable by the 2nd Defendant it would be that of:

- the creditors of the vendor with respect to both Marben School - Miritini and Marben School - Bombolulu as at 10th February, 2009

- those creditors which had been set out in Schedule II (therein referred to as the Vendor's creditors).

12. I have sought to identify Schedule II (vendor's creditors of Marben School). The Sale Agreement has 9 pages and none of them includes a Schedule I or Schedule II. Nor is there anything in the nine pages of the Agreement setting out the Vendor's creditors. The list identified by the Plaintiff at page 98 of the bundle of documents is entitled: **"Debtors."** Given its title, it must emanate from a creditor, but in any event, I am unable to make a natural or logical connection between the Agreement and that list.

13. Given that the application herein seeks summary judgment on a **"joint and several"** basis, I am unable to grant the same on that basis. Given the different interpretations of the Agreement and Debtors list, I do find that this is an issue that is in itself contentious and triable, and should be subjected to trial.

14. Finally, there is the 1st Defendant's gripe that the Plaintiff's demand letter was not served on them as it does not contain their address and that this will raise a triable issue as to whether demand was made. I have perused the said letter which is at page 71 of the Applicant's bundle of documents and observe that it is merely addressed to **"the Directors, Marben School, Nairobi."** In the Plaint, the 1st Defendant is stated as a male adult working for gain in Machakos and trading as Marben School, Mombasa. I think this is a notable discrepancy, that may raise a triable issue.

15. For all the above reasons, I decline to grant the Plaintiff's application which is hereby dismissed with costs to the Defendants.

Orders accordingly.

SIGNED BY:

……

R.M. MWONGO
JUDGE

Read in open court on this 8TH day of June, 2012

(BY HON. JUSTICE JOHN MWERA)

Coram:
1.Judge: Hon. John Mwera

2.Court clerk: T. Furaha

In Presence of Parties/Representative as follows:

a) …….

b) …….

c) …….

d) …….