



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 92 OF 2003

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

SYNTAX PRINTERS LTD.....1ST DEFENDANT

PUAL KIPKURUI CHEMWENO.....2ND DEFENDANT

JOHN CHEMARINGO.....3RD DEFENDANT

R U L I N G

The applications by the plaintiff is for striking out the third defendant's defence and entry of summary judgment against the third defendant on the grounds that the plaintiff's claim is for a liquidated amount and that the third defendant's defence is a sham, frivolous, meant to delay the trial of the matter and fails to raise any triable issue and is an abuse of the court process.

In the supporting affidavit by the plaintiff's Branch Manager dated 24th February, 2004, it is contended that the plaintiff advanced a sum of Kshs.485,000/- to the first defendant on the security of a guarantee executed by the second and third defendants together with one Edward Biwott on the 30th March, 1995 and a further guarantee dated 22nd December, 1995. The second and third defendants together with the said Edward Biwott (now deceased) were, directors of the first defendant but in breach of the terms and conditions of the guarantees failed to pay the guaranteed amounts together with interest. The first defendant also failed and/or neglected to repay the money advanced to it together with interest. It is further contended by the plaintiff that despite being notified of the first defendant's failure to repay the money advanced, the second and third defendants have failed to honour the guarantee such that the amounts have continued to attract interest at the rate of 28% per month leading to an outstanding balance in the sum of Kshs,4,491,020/85 as at 23rd February, 2004. The plaintiff also contends that the third defendant's defence does not raise any triable issues and ought to be struck out.

In response to the foregoing contentions by the plaintiff, the third defendant filed grounds of opposition dated 28th May, 2004 in which he attacks the competence of the application and contends that his defence raises triable issues which need to be dealt with by way of a full trial.

The third defendant also contends that he is sued jointly and severally with the first and second defendants and that the plaintiff is jumping the guns since his defence raises weighty issues. Further the plaintiff has not lifted the corporate veil against the first defendant which is a legal entity to warrant it (plaintiff) to pursue the claim against the third defendant who is only an agent.

It is also the third defendant's contention that the plaintiff's application is vexatious and otherwise an abuse of the court process.

Learned counsel **Mr. Songole** argued the application on behalf of the plaintiff while learned counsel **Mr. Omboto** did likewise on behalf of the third defendant.

Having considered the application and the rival arguments by both counsel, this court must take note of the fact that a party ought not be driven from the seat of Justice if he shows that he has a defence which should reasonably be considered on merits. Such a defence would be one raising issues which are triable and call for determination after a full hearing of the matter.

Herein there is a statement of defence filed by the third defendant dated 2nd January, 2004. At most, it is a mere denial of the allegations made against the third defendant by the plaintiff. It is a bare defence which has not been injected with any life by way of a supporting affidavit thereby implying that there is no denial of the facts and annexures contained in the plaintiff's supporting affidavit.

The suit was filed against all the defendants jointly and severally. Therefore, the plaintiff was at liberty to pursue any of the defendants to recover the loan advanced to the first defendant and re-payment thereof guaranteed by the third defendant among others. In the circumstances, the third defendant cannot escape from his legal obligations by hiding under the corporate veil. He has plainly no defence against the plaintiff's claim.

In the case of **Industrial & Commercial Development Corp. v.s. Daber Enterprises Ltd. (2001)EA. 75**, it was held that unless the matter is plain and obvious a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial.

Herein the issues arising are plain and obvious. The plaintiff would therefore be entitled to application of summary procedure against the third defendant whose statement of defence is a mere denial and devoid of any reasonable triable issues.

Consequently, this application by the plaintiff is granted to the extent that the defence by the third defendant dated 2nd January, 2004 be and is hereby struck out and judgment be entered against him as prayed in the plaint.

Ordered accordingly.

J.R. KARANJA

JUDGE

(Delivered and signed this 17th day of February, 2011 in the presence of M/S Langat for 3rd defendant).