



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.350 OF 2007

**TRANSNATIONAL BANK
LIMITED.....PLAINTIFF**

VERSUS

COMMODITY EXCHANGE LTD.....	1ST
DEFENDANT	
JANNIFER JEMUTAI KOSITANY.....	2ND
DEFENDANT	
REGINA WILLINGTON KARANJA.....	3RD
DEFENDANT	
RICHARD ETHAN NDUBAI.....	4TH
DEFENDANT	

RULING

The Applicant in the Notice of Motion dated 31st August 2010 prays for judgment against the 4th Defendant in the sum of Kshs 25,443,840, plus interest at the rate of 17.75% from 1st April 2007, being the sum claimed under the Plaint dated 5th July 2007. The said sum represents monies the Applicant claims to have lent to the 1st Defendant, the repayment of which was secured by two continuing guarantees, executed by the 2nd, 3rd and 4th Defendants on 29th June 1994.

As deponed in the Supporting Affidavit, sworn by the Applicant’s Legal and Human Resources Manager JACQUELENE ONSANDO, on 31st August 2010, the money claimed was advanced to the 1st Defendant “on various dates” of which the sum specified represents the outstandings as at 1st April 2007, as a consequence of the 1st Defendant’s default in the repayment of the loan.

To support the application for summary judgment, the Plaintiff/Applicant has annexed to the Supporting Affidavit, 2 copies of guarantees (annextures "JO1") executed by the 2nd, 3rd and 4th Defendant/Respondents on 29th June 1994 and 4th March 1996 to secure the lendings of upto Kshs 7,000,000/= and Kshs 10,000,000/= respectively. A copy of a demand letter sent to the 4th Defendant on 13th April 2007, is also annexed as "JO-2". The Applicant contends that, in light of this evidence, the defence filed by the 4th Respondent on 3rd April 2008, is a mere denial of liability and does not raise any triable issue.

To oppose the application, the 4th Defendant/Respondent filed a Statement of Grounds of Opposition dated 12th January 2011 and a Replying Affidavit dated 8th February 2011. In the Replying Affidavit, the 4th Respondent denies the debt and avers that paragraph 11 of his defence does raise triable issues necessitating a full trial. The same is stated in the grounds of opposition which also challenges the present application as being incompetent, vexatious, frivolous and an abuse of the process of court. The 4th Defendant/Respondent denies any contract between himself and the Applicant, or any privity of contract between them, stating that he never consented to, nor was he a party to the arrangement between the Applicant and the 1st Defendant/Respondent under which the sums claimed were lent to the 1st Defendant/Respondent.

In the oral Submissions made on behalf of the Applicant, learned counsel Mr. Werimo, told the court that the annexures to the Supporting Affidavit were sufficient proof of the 4th Respondent's indebtedness since he had appended his signature to the guarantees. He pointed out that paragraph 11 of the Defence ought not to be seen as raising any triable issue since all it says is that the 4th Respondent guaranteed the 1st Defendant's borrowing upto a maximum limit of Kshs 2 million. Counsel relied on the case of **MAGUNGA GENERAL STORES –V- PEPCO DISTRIBUTORS LTD [1987] 2 KAR 89**, to support the Applicant's case.

In reply, learned counsel for the Respondent Mr. Onyancha, submitted that the 4th Respondent, having denied any consent to the lending, should not be held accountable for the 1st Defendant's default. He asked the court to find that the averment in the Defence that the 4th Defendant/Respondent only guaranteed the advances to a maximum of Kshs 2 million is a triable issue, even in the absence of any documentary evidence to that effect. Also that, in the absence of statements to show how the sum claimed was arrived at, there exists no clear and/or certain circumstances for summary judgment to issue. That all the 4th Respondent received was a demand notice which did not explain the debt. Counsel cited **TRANSNATIONAL BANK LTD –V- RED BULL LTD & 2 OTHERS [2005] eKLR** and **OSODO – V- BARCLAYS BANK INTERNATIONAL LTD [1981] KLR 31**, to support the 4th Respondents objections.

The above submissions have been considered in light of the law as it relates to summary judgment. It is trite that such judgments can only be awarded in clear, straightforward and obvious cases, where such clarity, straightforwardness and obviousness is deducible from the pleadings themselves. Where it is not the case, the court will allow a Defendant to urge his defence at the trial whereby the Plaintiff would have to call evidence to prove his allegations. Even a prima facie triable issue will normally suffice.

The stated paragraph 11 of the Defence addresses the averments in paragraph 6, 9, 10 11 and 12 of the Plaintiff wherein the Applicant sets out the manner in which the amounts claimed were lent to the 1st Defendant and secured under the Guarantees and Indemnities as stated in paragraph 6 of the Plaintiff. The facts are denied by the 4th Defendant and the Plaintiff/Applicant put to strict proof. The Guarantees

themselves are specifically denied in paragraph 4 and 5 of the 4th Defendant/Respondent's Defence. As the Applicant's suit and application are founded on the Guarantees alone, which are referred to in the Plaintiff and exhibited as annexures to the Supporting Affidavit, I am unable to say with certainty that the same relate to the facts stated in paragraph 6 of the Plaintiff, which talks of Guarantees and Indemnities not exceeding the aggregate sum of Kshs. 17,000,000/= . This is particularly so since the dates of borrowings/advances and/or remittances to the 1st Defendant are not stated. In paragraph 7 of the Plaintiff, the Plaintiff clearly states that

“The Plaintiff will crave leave to refer to the said continued Guarantees and Indemnities referred to in paragraph 6 -----at the hearing for their full meaning and effect”.

The Guarantees having been denied as stated herein, I find that the 4th Defendant's Defence is not a sham. It raises a triable issue as submitted by the Respondent and the suit should proceed to trial so that the Plaintiff can prove both liability and quantum for a fair and just determination of the dispute.

Accordingly the application is dismissed with costs to the 4th Defendant/Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 1ST day of SEPTEMBER, 2011

M. G. MUGO

JUDGE

In the presence of:

No Appearance For the Applicant

Miss Ndungu holding brief for Mr. Onyancha For the Respondent