



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 511 OF 2009**

**CREATIVE CAPITAL SOLUTIONS  
LTD.....PLAINTIFF**

**VERSUS**

**GEOSPA DRILLING LTD.....1<sup>ST</sup>  
DEFENDANT**

**GEORGE AHERE.....2<sup>ND</sup>  
DEFENDANT**

**DANSON AHERE.....3<sup>RD</sup>  
DEFENDANT**

**RULING**

The applicant in the Notice of Motion dated in the 6<sup>th</sup> October 2009, Creative Capital Solutions Ltd, seeks an order for Summary Judgment against the three defendant/respondent, jointly and severally, in the sum of Kshs11,941,481/= with compound interest at the rate of 5.5% per month as from 30<sup>th</sup> June, 2009 until payment. The applicant claims that the said sum was loaned to the 1<sup>st</sup> defendant as a short term loan on or about 30<sup>th</sup> May 2009 under an agreement of the said date. The initial amount advanced to the 1<sup>st</sup> defendant/respondent as per the said agreement was Kshs. 4 million payable within 6 months.

To secure the loans the 1<sup>st</sup> defendant is said to have executed the bill of exchange and to have drawn post dated cheques in favour of the applicant to cover the principal and interest, while the 2<sup>nd</sup> and 3<sup>rd</sup> defendant/respondents executed personal guarantees as directors of the 1<sup>st</sup> defendant/respondent. The guarantees were in respect of the aggregate amount due from the 1<sup>st</sup> defendant/respondent. The applicant contends that by the execution of the said guarantees, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent bound themselves to liability for the said sums, thereby giving the applicant the right to sue them in their personal capacity. The application is premised on eight grounds and supported by an affidavit sworn by Sadiq Dewany dated on 26<sup>th</sup> October, 2009. The grounds in support are as follows:-

- 1. THAT the defendants are jointly and severally well and truly indebted to the plaintiff for the sum of Kshs. 11,307,241.00/= and were so indebted at the commencement of this suit.**
- 2. THAT the judgment sought by the plaintiff herein is for a straight forward liquidated sum.**
- 3. THAT the defendants do not have any or any reasonable defence to this suit**
- 4. THAT the purported defence filed herein by the defendants is not a valid defence and the same**

is not reasonable or genuine.

**5. THAT the purported defence herein does not disclose any or any reasonable defence against the plaintiff's claim, for which the defendants are well and truly indebted to the plaintiff.**

**6. THAT the defence filed herein is a sham and does not disclose any triable issues.**

**7. THAT the defence is bad in law and is scandalous, frivolous, vexatious and calculated to delay the fair and expeditious disposal of this suit and is an abuse of the process of this court.**

**8. THAT the defendants are jointly and severally truly and justly indebted to the plaintiff.**

In the affidavit filed in support of the motion, the applicant states that the defence is scandalous and that the loan, the subject matter of this suit was granted to the 1<sup>st</sup> defendant/respondent company, at the request of its directors, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, who intimated to the applicant that the 1<sup>st</sup> respondent had secured a lucrative contract and would therefore be able to repay the loan. The following documents are annexed to the supporting affidavit in support of the applicant's claim.

**(1) A copy of an agreement dated 30<sup>th</sup> May 2007 ("SD3") referred as a "Factoring Agreement for KShs.4,000,000/= (Four Million Shillings Only)"**

**(2) A copy of a Bill of Exchange dated 30<sup>th</sup> May 2007 for KShs.4,880,000/= ("SD4")**

**(3) Copies of Directors' Personal Guarantees dated 30<sup>th</sup> May 2007 ("SD5A" and "SD5B")**

**(4) A Loan Amortization Schedule dated 30<sup>th</sup> May 2007 ("SD6")**

It is deponed in paragraph 11 of the supporting affidavit that the 1<sup>st</sup> defendant defaulted in making the repayments of the loan as agreed, in breach of the terms and conditions of the factoring agreement, thereby causing the applicant to demand the same, under as cover of its letter dated 20<sup>th</sup> November 2007, a copy of which is annexed as "SD7". After several other demands, which went unheeded by the respondents, the applicant then filed this suit. It is further deponed that the respondents acknowledged their indebtedness to the applicant and made proposals to pay the debt, which proposals were not acceptable to the applicant. Copies of the correspondence exchanged in that regard has been annexed to the supporting affidavit as "SD8A" and "B". The 2<sup>nd</sup> and 3<sup>rd</sup> guarantees were subsequently invoked by the applicant under the notices of invocation dated "SD9'A" and "SD9'B". It is further deponed in paragraph 16 of the same affidavit that, at the time of filing suit, the amount due from the respondents amounted to KShs.11,307,240/= and that the same continued to accrue interest at the rate of 5.5% per month. In sum, the applicant's claim is that the defence filed on behalf of the defendants consists of mere denials and was filed with the sole purpose of delaying the early conclusion of this matter. In view of this therefore, the plaintiff claims to be entitled to summary judgment for the sum claimed.

In its plaint, the applicant has stated in paragraph 6 that the amount loaned to the applicant was KShs.4,000,000/= with the interest of 5.5% per month for a period not exceeding six months. In paragraph 8 it is stated that the defendants/respondents paid to the applicant a sum of KShs.1,050,000/= and promised to remit the balance said to have been KShs.4,593,178/= soon thereafter. In paragraph 9 the plaint states that the outstanding amount owed to the applicant as at 30<sup>th</sup> June 2007 was KShs.11,941,481/= at the same rate of interest.

In their defence, the three defendant/respondents deny that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant/respondents were either directors or guarantors of the 1<sup>st</sup> defendant/respondent or that the 1<sup>st</sup> defendant/respondent was advanced KShs.4,000,000/= million by the applicant. They further deny having jointly and severally entered into any agreement or contract as alleged in paragraphs 6 and 7 of the plaint or that they are in that respect jointly and severally indebted to the applicant in the sum of KShs.11,941,481/= as alleged in paragraph 9 of the plaint. They contend that the plaintiff's suit is bad in law as it fails to disclose any cause of action under the law of contract and deny having ever been served with a demand or notice of intention to sue. They deny that they have refused or neglected to pay the sums claimed under such demand or notice.

In opposing the notice of motion, the defendant/respondents chose not to file the replying affidavit. Instead they have raised five grounds in defence of the application for summary judgment and incorporated the same in the body of their written submissions. The said grounds are set out as follows:-

**1. The amount of Kshs 11,307,241.00/= applied for by the plaintiff is not a liquidated demand in text and spirit of the guiding law being Order 35 Rule 1 Cap. 21, Laws of Kenya.**

**2. Set off through payments made by the defendants have not been considered in the said Application.**

**3. The defendant's have good defense against the entire debt of Kshs. 11,307,241.00 or any part**

thereof as may be alleged by the Plaintiff as clearly there are triable issues to be determined not by affidavit approach in summary judgment jurisdiction.

4. **The Defendant's are entitled to be allowed unconditionally to defend the Plaintiff claim in full trial.**

5. **The Plaintiff knew or had reasonable cause to know that his claim raises contentious issues deserving trial in full hearing.**

The written submissions were filed pursuant to directions of the court with the consent of both parties. The respondents main objection to the notice of motion is that the sums claimed in the notice of motion as stated in paragraph 16 of the supporting affidavit is not a liquidated demand since interest was not chargeable after 6 months when the facility lapsed and also because the 5.5% interest is expressed to be marginal and therefore ambiguous. The respondents have, in their submissions, stated that the documents produced to support the application show that certain repayments were made which were not discounted, thereby calling for a reconciliation of the account. They challenge the notice of motion as not presenting a proper case for summary judgment, since the evidence adduced to support the applicant's claim (being in the form of several documents attached to the supporting affidavit) is contradictory in itself and at variance with the sum stated in the plaint and the reply to defence. The respondents contend that in view of these contradictions it is not clear how the amount claimed in the application for summary judgment has been arrived at or how it relates to the one in the plaint.

The applicant's position is that the respondents having not filed any replying affidavit to challenge the facts stated in the supporting affidavit ought not to have been heard in the notice of motion which should be allowed in its entirety. In the written submissions, the applicant contends that there is no doubt that the parties hereto did enter into an agreement for the loaning of KShs.4,000,000/= to the 1<sup>st</sup> defendant/respondent which loan was secured under a bill of exchange executed by the 1<sup>st</sup> respondent and the personal guarantees of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant/respondents and that the supporting affidavit presents the facts as they are. The same having not been challenged through the filing of a replying affidavit it should, according to the applicants, be taken as presenting the correct position as regards the respondents' joint and several liability. The applicant has submitted further that, the personal guarantees exhibited herein clearly show that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents bound themselves to pay the plaintiff a sum of KShs.4,880,000/= under the said guarantees which have not been discharged.

Several authorities have been cited by the two opposing sides to support their arguments. The same have been carefully considered by the court in arriving at its decision in the matter. Regarding the contention that the respondents have not validly challenged the notice of motion, by reason of not having filed a replying affidavit. The applicants have rightly submitted that **Order L Rule 16(1)** as considered in the applicant's authority of **Mugambi vs. Gaturu** [1967] EA 196 would appear to operate against the respondents. The said provision reads as follows:

**“Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than 3 clear days before the date of the hearing.”**

The present application having been brought under **Order XXXV Rule 2**, I am of the considered view that the respondents are entitled to challenge the notice of motion on the strength of the grounds as incorporated in the written submissions in view of **Order XXXV Rule 2(1)** which provides as follows:

**“The defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.”**

In the case of **Mugambi vs. Gaturu** (supra), the Honourable Mr. Justice Madan (as he then was) had this to say in that regard:

**“In my opinion, therefore, the expression or otherwise in Rule 2 entitles a defendant to resist an application for summary judgment in manner other than by evidence or by his own viva voce evidence but only by properly admissible means (emphasis mine).”**

The inclusion of the grounds in the written submission ought to be deemed to be “properly admissible means” within the spirit of the law as it relates to applications for summary judgment, particularly since the applicants never raised any objection to the Respondents being allowed to file written submissions in reply to those of the applicants.

Our courts have held time and time again that summary judgment is a draconian procedure which must be administered with caution. In this regard the Court of Appeal in **Giciem Construction Company vs. Amalgamated Trade & Services Limited** [1983] KLR 186, the Court of Appeal held inter alia that:

**“The object of Order XXXV of the Civil Procedure Rules is to enable the plaintiff in a liquidated**

