



SOUTHERN CREDIT BANKING CORPORATION LTD. ...PLAINTIFF

VERSUS

MIT'S ELECTRICAL SERVICES LTD. 1ST DEFENDANT

CONCORD INSURANCE CO. LTD. 2ND DEFENDANT

R U L I N G

Notice of Motion dated 6/10/05 brought under **Order 35 Civil Procedure Code, Rules 1 and 5** and **Order XII Rule 6 Civil Procedure Code**. The applicant seeks summary judgment against defendants jointly and severally as prayed in the amended plaint and an order striking out the Amended Statement of Defence filed by the defendants with costs of the application.

The grounds upon which the application is based are that the defence is bogus, a sham, bare and does not raise any triable issues and that the first defendant is truly indebted to the plaintiff in the sum of Kshs.2,874,978/= as well as interest at the contractual rate of 20% p.a. compounded from 1/5/2004 and has admitted and acknowledged the indebtedness on several occasions.

The second defendant is bound by guarantee it executed in favour of the plaintiff. The application is supported by affidavit of Azmina Mulji. The contract of lending and the terms thereof are exhibited. The loan was disbursed by cheque on 5/4/2004 which at the request of the defendants was issued to Customs & Excise Department to clear defendant's tax liabilities. There is no dispute that the first defendant did execute the documents for the loan but denies the loan was paid to it on 1/4/2004.

It is denied that guarantee was executed on 5/4/04 pursuant to letter of offer dated 30/3/04. They signed a blank undated document. The document they signed was altered in material particulars by the plaintiff. They allege the guarantee was a forgery therefore unenforceable and without prejudice, and further without prejudice, strictly without prejudice.

In paragraph 11 of the defence the 1st defendant avers that this suit is premature since the loan facility has not been formally terminated or demanded in terms of letter of offer and the terms of alleged guarantee and therefore liability has not accrued. Interest is denied at 20% p.a. as illegal and unreasonable.

In the replying affidavit sworn by Satish Gandhi, described as Managing Director of 1st defendant. She admits having signed the document after "hurriedly checking the last page", and forwarded the same to second defendant to sign their part "who duly signed". A perusal of the document of guarantee shows that it was not dated and it was signed, sealed and delivered by Mits Electrical Services Ltd. and the name of the company borrowing money was changed from Mits Electrical Company Ltd. to Mits Electrical Services Ltd. The two companies were incorporated on different dates.

The second defendant also caused an affidavit to be sworn in this matter by one C.N. Umamaheswar, described as Executive Director of Commercial Insurance Co. Ltd. He confirms that the loan was to clear goods at Mombasa Port by the first defendant. He confirms that the document of guarantee was properly

signed by his company and also by first plaintiff, but states that he was guaranteeing the indebtedness of MITS ELECTRICAL CO. LTD. which was their company's client as shown by exhibit "CNU 5"

Parties have cited several authorities. Mr. Ogutu has referred to the case of **Lombard Finance Ltd. vs. Brookplain trading Ltd. & others** where there were alterations were not agreed by the parties to a deed. The court on appeal held: The rule that an alteration to a deed or instrument not approved by all the parties rendered the document void only applied to a material alteration and an immaterial alteration made in good faith did not amount to a forgery.

In the present suit the alteration relates to change of identity of the party concerned. Every company incorporated has its own legal identity and therefore the alteration is material. In the case of **Commercial Advertising & General Agencies Ltd. vs. Qureshi [1985] 458**, it was held:-

"Summary judgment is granted subject to their being no bona fide triable issue entitling a defendant to leave the defence."

In the present case the affidavits of the respondents do indicate and support the statement of defence that there are triable issues. In the case of **Shah vs. Pada Mshi [1984] KLR 531**, in that case, the Court of Appeal held:-

"Caution should be exercised in granting summary judgment as it is a drastic remedy involving the denial of the party against whom it is given his right to defend the claim made against him. If triable issue is found to exist, the court must order a trial even if the court strongly feels that the defendant is unlikely to succeed."

In this present case the defence is a denial of the receipt of loan where two companies appear to have been involved. The Court of Appeal did elaborate on the principle involved under **Order 35 Civil Procedure Code**. In the appeal **Nairobi Golf Hotels (Kenya) Ltd. vs. Lalji Bhimji Sanghani Builders & Contractors – Civil Appeal No.5 of 1997** at page 36.

Upon considering the issues raised by the defendants in their affidavits and in the statement of defence, I am satisfied that defendants have demonstrated triable issues and I dismiss the application and grant leave to the defendants to defend the suit.

The costs of this application shall be in the cause.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 27th day of October 2009.

JOYCE N. KHAMINWA

JUDGE