



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 1723 of 2000

DIAMOND TRUST BANK KENYA LTD.....PLAINTIFF

VERSUS

TRANSRAPID EXPRESS CARGO LTD.....1ST DEFENDANT

MABEL WAKASA ASUMBA.....2ND DEFENDANT

HESBON A. ASUMBA.....3RD DEFENDANT

R U L I N G

The plaintiff brought this application under provisions of **Order XXXV Rules 1(1) (a), (2), 8 (1)** of the **Civil Procedure Rules** seeking an order of this court for summary judgment to be entered against the 2nd defendant as prayed in the plaint. The plaintiff further asked the court to order the 2nd defendant to bear the costs of the application. The application is supported by the grounds on the face of the application and the annexed affidavit of Elizabeth Hinga, the Company Secretary of the plaintiff. The plaintiff stated that its claim was founded on a hire purchase agreement which was entered between the plaintiff and the 1st defendant and whose performance was guaranteed by the 2nd and 3rd defendants. The plaintiff contended that the 2nd defendant reneged on her undertaking to pay the balance of the hire purchase amount after the 1st defendant defaulted in its obligation to settle the said amount. The plaintiff stated that, as a guarantor, the 2nd defendant was obliged to satisfy the decree which had been issued in favour of the plaintiff.

In her supporting affidavit, Elizabeth Hinga deponed that the plaintiff had entered into a hire purchase agreement with the 1st defendant by which the plaintiff financed the purchase of a Nissan B12 Hi-Rider pick-up Registration No. KAJ 742P. The 1st defendant was required to repay the sum advanced in monthly instalments of KShs.41,202/50. The said amount was to be paid in 36 months. A copy of the hire purchase agreement was annexed to the affidavit. The 2nd and 3rd defendant executed a guarantee in which they agreed to pay the plaintiff if the 1st defendant defaulted in re-paying the hire purchase amount. She deponed that in breach of agreement, the 1st defendant defaulted in paying the said debt due. The plaintiff exercised its option under the hire purchase agreement and repossessed the motor vehicle. The motor vehicle was sold. However, the plaintiff did not recover the entire amount which was outstanding in respect of the said hire purchase agreement. The plaintiff filed suit against the 1st defendant and the two guarantors i.e. the 2nd and 3rd defendant. She deponed that judgment had been entered against the 1st and 3rd defendants. She urged court to similarly enter judgment against the 2nd defendant on the basis of the guarantee that the 2nd defendant had executed. She deponed that the 2nd

defendant was truly indebted to the plaintiff and the defence filed was a sham or was otherwise frivolous and meant to frustrate the plaintiff's rights under the hire purchase agreement and further that the defence was an abuse of the due process the law.

The 2nd defendant, Mabel Wakasa Asumba swore a replying affidavit in opposition to the application. She denied executing any document that could form a basis of making her liable to the plaintiff on account of the hire purchase agreement. The 2nd defendant deponed that the signatures in the said documents were not hers and therefore she could not be bound by the said guarantee. She further denied that she had appeared before one Charles Gitonga Mbabu and Mary Wangari Muange, the persons who purportedly witnessed her execute the said guarantee and the hire purchase agreement. She denied being the author of any letters which were written on behalf of the 1st defendant and which were addressed to the plaintiff. The 2nd defendant was of the opinion that the plaintiff should execute its judgment against the 1st and 3rd defendants before purporting to bring any proceedings for judgment to be entered against the 2nd defendant. The 2nd defendant deponed that she was a stranger to the activities of the 1st and 3rd defendants relating to the hire purchase agreement with the plaintiff and therefore she could not be held liable. She deponed that she had a good defence which raised triable issues and which should be allowed to go to full trial.

At the hearing of the application, I heard the rival submissions made by Mr. Rimui on behalf of the plaintiff and by Mr. Amolo on behalf of the 2nd defendant. The said counsel basically reiterated the contents of their respective clients' affidavits. Mr. Rimui referred to several decided cases in support of his argument that summary judgment should be entered against the 2nd defendant as prayed in the application. The issue for determination by this court is whether the plaintiff established a case to enable this court enter summary judgment in its favour as prayed in its application. **Order XXXV Rule 1 of the Civil Procedure Rules** grants this court jurisdiction to enter summary judgment in favour of a plaintiff who filed a suit for liquidated demand with or without interest. Before this court can enter summary judgment, it must be satisfied that the defendant has a defence on merit and which raises triable issues. The Court of Appeal in **Gupta –vs – Continental Builders Limited [1978] KLR** held that where a defendant raises one triable issue, the court is mandated to grant leave to such defendant to defend the suit. Law JA held at page 93 of his judgment as follows:

“In Camille –vs- Merali [1966] EA 411, 419, Spry JA said:

The general rule is, that leave to defend should be given unconditionally unless there is good ground for thinking that the defences put forward are no more than a sham.”

In the present application, the plaintiff contends that the defence file by the 2nd defendant is a sham and therefore in the circumstances summary judgment should be entered in favour of the plaintiff. On her part, the 2nd defendant vigorously urged this court to find that her defence raises triable issues which should be allowed to go to full trial.

The issue that came up to the fore for determination during the hearing of this application was whether the 2nd defendant signed the five documents that the plaintiff is relying in support of its application for summary judgment. The said documents are the proposal, the dealers invoice, hire purchase agreement, guarantee and indemnity (*individuals*) and a delivery receipt. It was the plaintiff's case that the above documents were executed by the 2nd defendant in her capacity as a director of the 1st defendant. The 2nd defendant denies any knowledge of the said documents. She further denies executing the said documents. I have perused the defence filed by the 2nd defendant. The 2nd defendant has been consistent in her insistence that she was unaware of the documents in question. She further reiterated that she never executed the said documents that could make her liable for the amount in the plaint to the plaintiff.

I have carefully considered the arguments made on this point. It is clear that the plaintiff would be required to present to this court evidence to support its contention that the 2nd defendant executed the said

legal instruments. May be the plaintiff would call the persons who allegedly witnessed the 2nd defendant execute the said legal instruments. They may also call a handwriting expert. This court noted that the plaintiff is seeking to hold the 2nd defendant liable on account of a guarantee which the 2nd defendant is purported to have executed in favour of the plaintiff on account of a debt incurred by the 1st defendant. The 2nd and 3rd defendants were at the material time said to be directors of the 1st defendant. The 2nd and 3rd defendants were husband and wife. According to Mr. Amolo, the two are now estranged. Mr. Rimui submitted that this court should compare the signatures on the contested documents with the signature of the 2nd defendant in the replying affidavit filed in court. This court cannot however reach a conclusive determination whether the said signatures on the contested documents, particularly the guarantee document, is similar or was made by the same hand with the signature in the replying affidavit. This court has taken into consideration that at the material time the guarantee is alleged to have been executed by the 2nd defendant, the 2nd and 3rd defendant were living together as husband and wife. The argument by the 2nd defendant that she did not sign the contested documents is an issue which can only be determined during full trial.

In the circumstances I hold that the 2nd defendant established that she has a triable issue relating to whether or not she executed the documents which the plaintiff is relying on as the basis of its application for summary judgment. As was held by Mandan JA in **DT Dobie & Co. (Kenya) Limited [1982] KLR 1** at page 9:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The above dictum is also applicable to defences. This court is unable and cannot shut out the 2nd defendant from the seat of justice after she has established that she has a triable issue in relation to the manner which the guarantee was executed. It is trite law that where a defendant establishes that she has a single triable issue, this court is required by law to grant such defendant an unconditional leave to defend.

In the premises therefore, the application for summary judgment fails. It is hereby dismissed with costs to the 2nd defendant. The 2nd defendant is granted unconditional leave to defend the suit.

DATED at NAIROBI this 27th day of FEBRUARY, 2008.

L. KIMARU

JUDGE