REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 3099 OF 1996

DEPOSIT PROTECTION FUND BOARD ..... PLAINTIFF

VERSUS

SUNBEAM SUPERMARKET LIMITED & 2 OTHERS ..... DEFENDANTS

RULING

This is a motion on notice expressed to be brought under order 35 rule 1 and order VI rule 13 (1) (b) of the Civil Procedure Rules for orders that summary judgment be entered for the plaintiff as prayed in the plaint or for such sum as this Honourable Court shall deem just to grant and that the counterclaim filed on 10.7.1997 be struck out. The motion is supported by an affidavit sworn by one Moses Mwangi Muthui, the liquidation agent of the Deposit Protection Fund Board, the liquidator of Trade Bank Ltd (in liquidation), the defendant herein. There is in opposition to the motion grounds of opposition filed on 22.9.98 and a replying affidavit sworn 8.10.98 by Noorali Ebrahim Mavani in his capacity as the second defendant, as a director of the first defendant, the latter two having duly authorized him to swear the said affidavit on their behalf. The motion was debated before me on 20.9.02 and 27.11.03.

The gist of the plaintiff's claim is this. On 9.5.91, Sunbeam Supermarket Ltd, the first defendant, made a written application to the plaintiff Bank requesting for two banking facilities: (a) a bill discounting facility for a maximum limit of Ksh 5 million and (b) a banker's guarantee to the plaintiff's suppliers amounting to Kshs 8.4 million. On the same date the Bank agreed to grant the first facility on the security of personal guarantees executed by the 2nd and 3rd defendants. In pursuance of the said agreement, the supermarket utilized the said bill discounting facility in full by discounting facility in full by discounting with the Bank two promissory notes drawn on 10.5.91 for Kshs 2.5 million each. In addition to the foregoing, on 14.5.91 and 21.5.91 respectively the Bank wrote to the Supermarket confirming acceptance or agreement to grant the second facility for a maximum of Kshs 4,800.000/=. Payment of that facility was also guaranteed to the Bank by the 2nd and 3rd defendants. Pursuant to the said contract, the Bank at the request of the Supermarket issued bank guarantees to the plaintiff's suppliers up to the said maximum limit of Kshs 4.8 million and upon maturity of the said guarantees the Bank paid the said sums to the suppliers on account or on behalf of the supermarket. Further and in addition to the above the Bank at the request of the supermarket granted overdraft facilities to the supermarket. It was agreed and a term of the said contracts that interest would accrue on the amounts overdrawn or advanced to the supermarket under the said banking facilities at the prevailing bank rates until payment in full and the defendants would be jointly and severally liable to repay to the Bank all the said sums plus interest thereon. On those premises, the plaintiff's claim against the defendants jointly and severally is for Kshs 36,997,813.75 due and owing as at 30.9.96 with further interest thereon at 18%per annum from 1.10.96 up to the date of payment in full

plus the costs of the suit. The written agreements for the banking facilities, the personal guarantee of the 2nd and 3rd defendants, the discounted bills of exchange, the request for the bank guarantees, an abstract of the guarantees issued, the terms of the said guarantees and a loan statement are all annexed to Mr Muthui's affidavit.

The opposition to the motion is both technical and substantive. At the technical level, it is contended that the application for summary judgement is incompetent on the grounds that the supporting affidavit is fatally defective in that (i) the deponent thereto does not aver that he verily believes there is no defence to the suit, (ii) the deponent thereto is not a person who can swear positively to the facts verifying the cause of action and any amount claimed, and (iii) the same is not based on personal knowledge. It is also contended that the application was not timeously brought. At the substantive level, it is contended that the defence filed raises several triable issues. I now turn to an examination of the competence and merit of the motion.

The argument that the supporting affidavit is fatally defective is predicated on the provisions of order 35 rules 1(2) and(9) and order 18 rule 3 (1) of the Civil Procedure Rules which provide in reverse order as follows:- Order 18

"3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

Order 35

"1 (2) The application shall be made by motion supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed. 9. Forms Nos 3A and 3B of appendix a, adapted to the circumstances, shall be utilized for the respective purposes for which they are designed. Forms 3A of Appendix A requires the affidavit to assume the following format:

"NO 3A

AFFIDAVIT (O XXXV r 2)

(Title)

I, ...of .....make oath and say as follows:-

1. The defendant(s) ...is (are jointly) and truly indebted to ..... in the sum of sh. .....for ....and was (were) so indebted at the commencement of this suit. The particulars of the said claim are set out in the plaint filed herein.

2. I verily believe that there is no defence to this suit.

3. The facts herein deposed to are within my own knowledge and I am duly authorized by the plaintiff to make this affidavit.

(Strike out paragraph 3 if affidavit made by plaintiff) Sworn, etc."

On the basis of the above rules and form, counsel for the defendant held forth as follows. Mr Muthui, the deponent of the affidavit, being the employee of the liquidator cannot have personal knowledge of the facts verifying the cause of action and the amount claimed as required by subrule 2 of rule 1 of order 35. Secondly, his affidavit does not conform to form 3A of appendix A and also offends order 18 rule 3 (1) in that (a) there is no deposition that he verily believes that there is no defence to the suit, and (b) paragraph 20 thereof discloses that the facts on which the affidavit is predicated are true to the best of his personal knowledge, information and belief contrary to the requirement that affidavits in proceedings other than

interlocutory should be based on personal knowledge. In response to those arguments, counsel for the plaintiff argued that the object of a supporting affidavit is to annex reliable evidence. That requirement has been satisfied here as the suit is based on bills of exchange and a guarantee which were not challenged. There was nothing for the deponent to add thereto. The requirement of personal knowledge would only come in if the facts were disputed. It was further contended that paragraph 3 of the supporting affidavit to the effect that the defendants were at the commencement of the suit and still are truly and justly indebted to the plaintiff as pleaded in the plaint was also in effect an affirmation of the plaintiff's belief that there was no defence to the claim. In any case, it was argued, the opinion of a witness did not bind the Court and it was for the Court to determine whether there was a defence to the claim.

I have considered those arguments and having done so I am of the following opinion on the procedural merits of the present motion. The plaintiff's case being predicated on agreements to provide bills discounting facility and banker's guarantees to 1st defendant's suppliers as well as the personal guarantees by the 2nd and 3rd defendants and the statement of account based thereon, Mr Muthui, the liquidation agent, in whose custody those documents are, is surely a person who can positively verify the pertinent facts and is accordingly a competent deponent of the supporting affidavit within the contemplation of order 35 rule 1 (2). As regards the omission in the affidavit to state his belief that there is no defence to the suit, I don't agree with counsel for the plaintiff that such omission is in substance made for by the deposition that the defendants are truly indebted to the plaintiff and were so indebted at the commencement of the suit. In my opinion and as form 3A shows, the two are treated as distinct averments. The averment as to the existence of the debt is one condition precedent to the invocation of the summary procedure pursuant to the provision of rule 1 (1) (a) (which applies to liquidated demand) for the plaintiff must show that the claim is for a liquidated demand. To depose as to the existence of the debt is quite different from deposing as to the non existence of a defence(s) to such a claim. For example, the debt may subsist and yet be irrecoverable due to the existence of a valid defence of limitation or illegality. The other condition precedent to the invocation of the summary procedure under order 35 is the plaintiff's *bona fide* belief that there is no defence to the claim it is an abuse of court process to seek judgment by a procedure other than a full trial. It is therefore essential, in my view that the deponent to the supporting affidavit must express his belief in the non existence of a defence to the suit. And that would be even more particularly necessary where, as here, the application for summary judgment is made after a defence and even a counterclaim to boot have been filed. Surely in such a scenario, unless the plaintiff can aver that notwithstanding the existence of such a defence, he still believed there was no *bona fide* defence to the suit, he would not be entitled to file any motion for summary judgment and any such motion filed without being grounded on such expressed belief ought to be struck out as an abuse of the process of the Court. In other words, I don't regard the omission to aver to the non existence of a defence as a mere omission or infraction of a procedural form. It is a matter of substance going to the root of the proper invocation of the summary judgment procedure and it is no defence to a challenge based on a want of such deposition that it is for the Court to determine whether there was a defence to the claim for before the Court can venture to examine whether there is a defence to the claim the summary procedure must be properly invoked. Be that as it may, in *Mwanthi v Imanene* [1982] KLR 323 (a decision which I confess was not brought to my attention by either advocate), the Court of Appeal took a different view. It held that failure to strictly comply with the manner of making the application for summary judgment as prescribed in form 3A was not fatal. It reasoned that the deposition that the defendant was justly and truly indebted to the plaintiff was another way of verifying the plaintiff's belief that there was no defence to the suit and that, in any case, the defunct of form was saved by the provisions of section 72 of the Interpretation and General Provisions Act, cap 2, as the same did not affect the substance of the affidavit and it was not calculated to mislead. Under the doctrine of *stare decisis* I am bound by the decision of the Court of Appeal regardless of whether I agree with it or not.

As regards the objection to paragraph 20 of the supporting affidavit, Iagree that a motion for summary judgment is not an interlocutory application. It is a final application and accordingly depositions of fact in support of such motion should be based on personal knowledge and not information and or belief. Having said that I must, however, says that in the case at hand the deponent has not stated any matter of fact predicted on information and/or belief. The statement in paragraph 19 that he is advised by the plaintiff's lawyers and verily believes that evidence of prior negotiations cannot be invoked to vary the terms of a written contract is an expression of a belief in a matter of law and is accordingly not prohibited by the

rule barring introduction of facts predicted on information and/or belief. Apart from that paragraph there is nothing else in the affidavit which is said to emanate from or appears to emanate from information supplied or belief held. Accordingly the reference in paragraph 20 to facts being true to the best of the deponent's personal knowledge, information and belief is inapt as regards information and belief and can be and should be treated as a misguided flourish which is not fatal to the affidavit. As regards the point that the motion was not timeously brought, I agree that applications for judgment should be brought timeously and that the present one was quite delayed. However no substantial prejudice to the adversary is shown and accordingly the motion cannot be refused on that ground alone. The upshot of my consideration of the technical objections to the application is that I reject the defendants' submissions that the motion for summary judgment is incompetent. I now turn to the substantive merits of the motion.

From the defence and counterclaim, the grounds of opposition and the replying affidavit on record the defendant's defence would appear to be this: (1) The credit facilities which were extended by the Bank to the supermarket including the bills discounting facility and the bankers guarantees were all tied up and were part and parcel of the various oral agreements made between the parties prior to the granting of those facilities which oral agreements were breached by the Bank resulting in considerable losses to the supermarket which breached and losses are the subject matter of the set off and counterclaim pleaded. If the said oral agreements are duly considered, the defendant is not indebted to the plaintiff and on the contrary, it is the plaintiff which is indebted to the defendants. The said agreements are complete, valid and enforceable oral agreements concluded prior to the transactions forming the basis of the plaintiff's claim and are enforceable by the Court. (ii) There is no evidence to support the plaintiff's claim on the basis of the banker's guarantees as it has not been shown that the supermarket's trade creditors supplied the goods or that the bank made to them any payments pursuant to the said guarantees. On the contrary, it is said, the Bank did infact cancel and revoke such guarantees as it had given to the supplies on behalf of the 1st defendant; and(iii) there is no evidence produced by the Bank of having discounted any bills accepted and subsequently presented to it by the supermarket. In those premises, the defendant's contend there are several triable issues and the suit should go to trial on *viva voce* evidence.

The plaintiff' s answer to those contentions is this. The existence of the oral agreements between the plaintiff and the first defendant is denied and it is contended that if such agreements did exist, they could not be admissible in evidence to vary or alter the terms of the written contract subsequently entered into and accordingly to the extent that the set off and counterclaim are predicated on the alleged oral agreements, the same cannot lie. Secondly, even if the counterclaim could lie, the same is not sustainable as the defendant did not obtain leave of the Court to commence the same. In that respect, reliance was placed on *Langley Construction Ltd v Sells* [1969] 2 All ER 46 where the English Court of Appeal held that if a company in liquidation brings an action, the defendant to that action may without leave of the Court under section 231 of the Companies Act, 1948 (the equivalent of section 228 of our own Companies Act) set up cross-claim for liquidated or unliquidated damages, but only as a set off to reduce or extinguish the plaintiff's claim and, accordingly, the defendant cannot without leave, counterclaim in the action for an amount in excess of the plaintiff's claim. Thirdly, the letter offering the bill discounting facility (exh "MM2" in the plaintiff's affidavit) provided that the lender's statements and records will constitute conclusive evidence of indebtedness in a court of law and accordingly, the plaintiff's statement of account showing the defendant's debt as at 30.9.96 in the sum of Kshs 36,997,813.75 is conclusive. Fourthly, the defendant's denial in paragraph 8 of the replying affidavit that any suppliers supplied goods to it is contradicted by paragraphs 7(f) and 9 of the defence which admit that the Bank gave bankers guarantees to the suppliers in the sum of Kshs 4,800,000/= and the supermarket ordered goods worth at least Kshs 10,000,000/= from various suppliers. Fifthly, the assertion in paragraph 14 of the replying affidavit that there was no evidence that the Bank discounted the defendant's bills is discounted by paragraph 7 (e) of the defence wherein an express admission is made that bills worth Kshs 5 million were discounted and the amount credited in the supermarket's account. Last, but not least, it was contended that where the cause of action is on a bill of exchange, the Court will not postpone judgment to await trial on a counter claim or set off except in very exceptional circumstances which was not the case here as the bills were admitted by the defendants and it was also admitted that the same were discounted and the proceeds thereof credited to their account and the set off claimed does not touch on the validity of the bills but on extraneous matters said to be contained in oral agreements. In those premises it was contended that no triable issues were raised but should the Court find any triable issues were raised but

should the Court find any triable issue on the guarantees, it should proceed to give summary judgment on portion of the claims relating to the Bills of exchange. Reliance was placed on *Gupta v Continental Builders Ltd* [1978] KLR 83.

Having considered the above substantive arguments by the respective advocates I make the following findings and conclusions. The defendants' defence and counterclaim heavily rely on the existence of separate prior oral agreements to refute the plaintiff's claim and sustain an allegedly bigger claim. The law relating to the admissibility in evidence of separate prior agreements to contradict, add, vary or substract from written contracts is codified in section 98 of the Evidence Act in clear language. In so far as it is material to this case, the section provides.

"S 98 When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the from of a document, have been proved according to section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:

Provided that-

(ii) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph or this proviso applies, the Court shall have regard to the degree of formality of the document;

(iii)the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved."

In the circumstances it is obvious that the defendants invoke the existence of prior oral agreements to deny their liability to the plaintiff under the written contracts relating to the bill discounting facility and the banker's guarantee facility. To that extent, the said agreements are invoked to subtract from the contents and consequences of those written instruments. That cannot be allowed by dint of section 98 of the Evidence Act unless the said agreements are introduced as regards matters on which the documents are silent and which are not inconsistent with their terms or as constituting a condition precedent to the attaching of any liability under the contracts. In my judgment such is not the case here and I accordingly find that no triable issue can be predicted on the existence of any such oral agreements. I further agree with the plaintiff's advocate that to the extent that the Bank in liquidation did not apply for leave to plead the counterclaim the same is unsustainable and there could be no question of leave to defend to the extend of the said counterclaim. As regards the liability on the discounted bills, I find that the defendants have no triable issues. The bills are admitted in the defence and so is their discount and credit of Kshs 5 million in the supermarket's account. As regards the bank guarantees to the supermarket's suppliers, I accept that the guarantees were given. However there is no evidence that the Bank was called upon and/or did pay the stated suppliers any amounts on the basis of the said guarantees. And the stipulation on the conclusive evidence of the debt in plaintiff's exhibit "MM2" clearly relates to debts on the bill discounting facility, not the supply guarantees. Further more, there is evidence in the defendant's replying affidavit that the Bank did cancel and revoke the supply guarantees. Further more, there is evidence in the defendant's replying affidavit that the Bank did cancel and revoke the supply guarantees given to various suppliers of the supermarket. In those premises, I find there is a triable issue as regards the liability of the defendants on the bank guarantees. Having come to those conclusions, should I enter summary judgment for the plaintiff in respect of the defendant's liability on the bills discounting liability? There is no question but that the Court has jurisdiction to enter summary judgment in respect of the part of the plaintiff's claim to which the defence set up does not apply. The only difficulty here is that it is not possible from the statement of account to tell how much of the claim of Kshs 36,997,813.75 as at 30.9.96 relates to the liability on the bills of exchange and how much relates to the bank guarantees. The only certain thing is that the defendants are jointly and severally indebted to the plaintiffs in the principal sum of Kshs 5 million plus interest thereon at 18% per annum from 1.10.96 until payment in full and give the defendant's leave to defend the rest of the plaintiff's claim.

As regards the prayer to strike out the counterclaim, I would accede to the same as leave to plead the same was neither sought nor given in accordance with section 228 of the Companies Act. The counterclaim was in effect a cross suit against a company in liquidation. The claim is therefore unsustainable and to that extent frivolous and vexatious in terms of order VI rule 13 (1) (b).

The upshot of my consideration of the motion is that the plaintiff's application for summary judgment succeeds to the extent of Kshs 5 million together with interest thereon at 18% per annum from 1.10.96 until payment in full. The defendants are given unconditional leave to defend the balance of the claim and the prayer for striking out the counterclaim is allowed as prayed. The issue of costs of the motion should be canvassed at the trail.

Orders accordingly.

Dated and Delivered at Nairobi this 20th day of January 2004.

A.G.RINGERA

JUDGE