REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1755 OF 2000

DIAMOND TRUST BANK KENYA LIMITED …… PLAINTIFF

VERSUS

DALIP SINGH DHANJAL ……..……. 1ST DEFENDANT

JASWANT SINGH DANJAL ……. 2ND DEFENDANT

NARINDER SINGH DHANJAL …… 3RD DEFENDANT

BALDEV SINGH DHANJAL ……. 4TH DEFENDANT

NIRMAL SINGH DHANJAL …… 5TH DEFENDANT

RULING

The plaintiff has brought this application under O. VI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that the defendants' statement of Defence be struck out and judgment be entered against the defendant as prayed in the plaint. The application is supported by an affidavit sworn on 18.1.2001 by Charles Kamunde Ndegwa, the plaintiff's Credit Controller. There is a further affidavit in support of the application sworn on 6.2.2000 by Elizabeth Wanjiku Hinga, the plaintiff's Company Secretary.

In opposition to the application the defendants have filed a replying affidavit sworn on 3.2.2001 by Dalip Singh Dhanjal, the 1st defendant.

The circumstances leading to this application are that on 3.10.2000, the plaintiff filed a suit against the five defendants herein seeking to recover the sum of Shs.86,621,675.39 as at 31.5.2000 together with interest thereon at the rate of 27% per annum from 1.6.2000 till payment in full. According to the averments in the plaint, the plaintiff's claim arises from two loans of Shs.45,000,000/= and Shs.25,000,000/= advanced to a limited liability company known as Dhanjal Investments Limited (the company) in which the defendants are shareholders and directors. The loans were advanced pursuant to two loan agreements dated respectively on 25.6.1996 and 29.1.1997. It is the plaintiff's contention that the loans were secured by, inter alia, the joint and several guarantees of the defendants as principals and that as the company has defaulted in the repayment of the two loans, the defendants are jointly and severally liable.

In their joint defence the defendants deny the agreements. They further deny that any moneys were advanced to the company. They also deny in paragraph 5 of the defence that the loans were secured by their joint and several guarantees. But in paragraph 6 of the defence, the defendants contradict themselves

by stating (which is not a permissible way of pleading, see O. VI Rule 6(1) of the Civil Procedure Rules) that if any loan was secured, then the same was to be secured by way of a mortgage over the company's immovable property and that any guarantees would be collateral to such security.

I pause here to observe that no evidence whatsoever was tendered through the replying affidavit or otherwise to substantiate that claim and that, as the documents shows, the guarantee in fact created primary obligations distinct from the charge documents. I may also add that the defendants' averment that it was an express or implied term of the guarantee that the plaintiff would, before calling upon the defendants to honour the terms of the guarantee, first realise the securities given, if any, after which it would recover the shortfall from the defendants is not supported by evidence.

The defendants also deny that the two loans were later consolidated; that any interest was waived or that the balance outstanding was to be repaid over a period of 60 months and at an interest rate of 27% per annum. They further deny that any demand has been made upon the company or themselves to pay the money or honour the guarantees. In short they have denied everything.

But when in this application the defendants were confronted with clear evidence by way of documents annexed to the affidavit in support of the application substantiating the plaintiff's claim, the defendants found themselves unable to repeat their blanket denials. However, without acknowledging the obvious fact that they were changing the position they took in their defence, they admit in the replying affidavit not only that the loan agreements were signed but also that the loans were made. They also admit having executed the guarantees.

Regarding the guarantees it is to be observed that it was a continuing security and was signed by all the defendants. It is further to be noted that when the terms of the existing loan were subsequently altered which alterations were clearly made at the request of the defendants (see annexture 'EKN2' to the supporting affidavit) all such alterations were agreed by all the defendants who as evidence of their acceptance of the alterations appended their respective signatures to the letter specifying the new terms. Given those circumstances, it cannot be said that the nature of the existing liability was changed or that any changes in respect of the existing liability were made without the knowledge or consent of the defendants.

Accordingly, the authority of Kenya National Capital Corporation Vs. Thammo Holdings Limited (HCCC No. 1301 of 1985) cited by learned counsel for the defendants (Mr. Mutai) has no application to this matter. The decision in the authority was based on the fact that the nature of the transaction which the guarantors had guaranteed had been changed without reference to the guarantors with the result that the court found the guarantors discharged. That is clearly not the case here.

With respect to the claim that the guarantee was collateral to the mortgage, I think the document speaks for itself. It states in clause 1:-

> ***"If and whenever the Borrower make default in the payment of the Loan Amount or nay part thereof we shall o n demand pay the same together with any interest thereon due."***

There is no mention or reference to any mortgage or other security; the only condition precedent to the plaintiff's right of recovery under the guarantee being default by the company. In view of that, the contention by the defendants that the guarantee was a collateral security lacks substance.

In the course of his submissions, Mr. Muturi said that the guarantees were unenforceable for lack of consideration. Though that is not part of the defence, I have to say that the contention is clearly unsustainable having regard to the fact that the guarantees were given in consideration of the loan of Shs.45,000,000/= and Shs.25,000,00/= which said loans the defendants admitted were advanced and utilized. The first guarantee was executed on 19.7.1996 some 24 days after the signing of the relevant loan agreement for the loan of Shs.45,000,000/= while the second guarantee of Shs.25,000,000/= was executed on the same day the loan agreement was signed. There is also no evidence to show, as is implied by the defendants in paragraph 14 of the replying affidavit, that any loan moneys were disbursed before

the execution of the guarantees. Given those circumstances, the contention that the guarantees fails for want of consideration because they were entered into after the loan agreement were signed and the loans advanced, absolutely lacks substance and is rejected.

As far as I can see, the only other matters that call for further comment arise from the complaints made by the 1st defendant in his affidavit. He claims that interest rates were unlawfully altered on several occasions without notice and that those unlawful alterations are in breach of the agreement between the parties. According to him, the breach renders the agreement null and void and unenforceable. The first point which must be made with regard to that complaint is that it is not part of the defence and the complaint is therefore irrelevant to the issue before court. The second point is that the complaint is unsustainable. I say so because no evidence has been tendered to establish that unlawful interest has been charged or when it was charged and at what rate. In the absence of such evidence, the complaint remains a baseless irrelevance which cannot be used to vitiate either the agreement between the parties or the guarantees given by the defendants.

All in all, my assessment of this matter is that the defence put forward by the defendants is a sham which raises no single triable issue. I say so because the plaintiff having established that there was an agreement between it and the company to advance to the company the loans aforesaid and that the repayment of the two loans was guaranteed by the defendants jointly and severally and also that default on the part of the plaintiff having been shown, the defendants are bound to show that either the loans have been repaid (which they have not done) or that for some other reasons they are not liable. That is what the Court of Appeal decided in the case of Magunga General Stores v. Pepco Distributors Limited (1988-92) 2 KAR 89 when it held that:-

> ***"A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence."***

The same court also stated in the case of Johnson Kinyanjui & Another V. Rachel Wahito Thande & another (Court of Appeal, Civil Appeal No. 284 of 1997) that 'a sham defence is clearly calculated to embarrass or delay the fair trial of a case'.

The case of D. T. Dobie & Co. (K) Ltd. v. Muchina & Another (Court of Appeal, Civil Appeal No. 37 of 1978) as well as several other cases is authority for saying that "the jurisdiction of striking out is a draconian one which ought to be exercised only in clear and obvious cases". But is also the law that where the court is satisfied that the defence put forward by the defendants is a sham which raises no triable issues and is therefore scandalous and frivolous and merely intended to delay the fair trial of the case, then the court is obliged to exercise its powers under O. VI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules and strike out the defence.

Accordingly, having been satisfied as shown above that the defence put forward by the defendants herein is scandalous and frivolous and is intended only to delay the fair trial of this suit, I strike it out and enter judgment in favour of the plaintiff against the defendants as prayed in the plaint. The defendants will jointly and severally bear the plaintiff's costs of this suit.

Dated at Nairobi this 3rd day of August, 2001.

T. MBALUTO

JUDGE