



Simple Pay Capital Limited v Gems National Academy Limited & 5 others (Commercial Case E204 of 2024) [2025] KEHC 5694 (KLR) (Commercial and Tax) (6 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E204 OF 2024**

AA VISRAM, J

MAY 6, 2025

BETWEEN

SIMPLE PAY CAPITAL LIMITED PLAINTIFF

AND

GEMS NATIONAL ACADEMY LIMITED 1ST DEFENDANT

ERNEST MUREITHI WAITHAKA 2ND DEFENDANT

TERENCE NDANYI 3RD DEFENDANT

DANIEL KARANI GUNGU 4TH DEFENDANT

REGIS RUNDA ACADEMY LIMITED 5TH DEFENDANT

RUNDA GARDENS DEVELOPMENT LIMITED 6TH DEFENDANT

RULING

1. I have considered the Notice of Motion Application dated 5th November, 2024, filed by the 3rd Defendant seeking to be struck out as a party to the suit (hereinafter referred to as “the Application”), together with reply filed in opposition to the same, the grounds of opposition, the submissions of the parties, and the applicable law.
2. The Application is supported by the supporting affidavit of Terence Ndanyi (the 3rd Defendant herein) on even date. The Plaintiff opposed the Application, vide its replying affidavit dated 13th January, 2025, sworn by Yashika Sagar. The 5th and 6th Defendants opposed the Application vide grounds of opposition dated 21st January, 2025. In response to the Plaintiff’s replying affidavit dated 13th January, 2025, the 3rd Defendant/Applicant filed a supplementary affidavit dated 19th February, 2025.
3. The sole issue for determination is whether the 3rd Defendant ought to be struck out from the Suit?



4. The Applicant submitted that the Plaintiff does not have a solid cause of action against the Defendant. The Defendant argued that he was merely an employee of the 1st Defendant, as its Chief Operating Officer, and was required to execute company documents including personal deed of guarantees and indemnities for the benefit of his employer, the 1st Defendant.
5. He averred that under the instructions of the 1st Defendant, he executed the subject personal deed of guarantee and indemnity in favour of the Plaintiff. He claimed that he had no proprietary interest in the suit property, and is improperly joined in these proceedings and is not a necessary party to the suit.
6. He pointed out that the loan in question was disbursed to his employer, the 1st Defendant herein, for its own benefit, expansion and improvement of the school premises, and therefore there was no basis for joining him to the suit because the 1st Defendant was already a party to the suit.
7. He clarified that he executed the Personal Guarantee and Indemnity dated 13th June, 2022, for the loan in the amount of Kshs. 60,000,000/-, but did not execute any guarantee in respect of the loan agreement dated 28th December, 2022, for Kshs. 80,000,000/-.
8. In opposition to the Application, the 5th and 6th Respondents submitted, in summary, that the 3rd Defendant had unequivocally admitted to be a party to the loan and guarantee contract dated 13th June, 2022, on which the Plaintiff grounds its cause of action, and sues, in respect of the suit.
9. Further, that a material issue in the suit is whether or not the Plaintiff is entitled to recover the outstanding loan amounts under the contract from the borrower or jointly, from its guarantees, namely the 2nd and 3rd Defendant? This determination will require the presence of the Applicant to the proceedings.
10. In further opposition, the Plaintiff submitted that the 3rd Defendant is a necessary party as a guarantor. The Plaintiff cited the definition of a contract of guarantee as found in the “The Law of Guarantees” by Geraldine Andrews & Richard Millet 2nd Edition at Page 156 as follows:-

“ A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation.”
11. The Plaintiff pointed out that it is undisputed that the 3rd Defendant/Applicant executed a Personal Guarantee and Indemnity dated 13th June, 2022, produced as Annexure “YS-4” on the Plaintiff’s replying affidavit dated 13th January, 2025. The guarantee was signed by the 3rd Defendant, who understood its contents and details before appending his signature and the allegation that he executed the guarantee on the balance of power in an Employer-Employee relationship as averred, does not hold water.
12. The Plaintiff submitted that it is trite that parties are bound by their signatures. In support of the same, it relied on the decision in Mrao Ltd versus First American Bank of Kenya Limited & 2 Others [2003] eKLR Kwach, JA (as he then was) held as follows:-

“...it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual



interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters..."

13. Further to the above, the Plaintiff submitted that at paragraph 2 and 4 of the supporting affidavit, the 3rd Defendant has admitted that as the Chief Operating Officer, and in his capacity as a senior employee, executed a Personal Deed of Guarantee and Indemnity pertaining to the loan advanced to the 1st Defendant.

14. Looking at Clause 1 of the Personal Guarantee and Indemnity dated 13th July, 2022, executed by the 3rd Defendant herein and produced as Annexure "YS-4" of the Plaintiff's replying affidavit dated 13th January, 2025, the same states as follows;

" 1: Guarantor To Pay On Demand

The Guarantor will pay to Simple Pay on demand all money and discharge all obligations and liabilities, whether actual or contingent now or hereafter due and owing or incurred to Simple Pay by the Principal Debtor in whatever currency denominated whether on any current or other account or otherwise in any manner whatsoever (whether alone or jointly and in whatever style, name or form and whether as principal or surety)....."

15. Additionally, Clause 25 of the Personal Guarantee and Indemnity dated 13th July, 2022, executed by the 3rd Defendant herein and produced as Annexure "YS-4" on the Plaintiff's replying affidavit dated 13th January, 2025, provides as follows;

" 25: Joint And Several Liability

Where this guarantee is signed as guarantor by more than one person or is signed by one person for himself and on behalf of other persons (whether such person is signing on behalf of a partnership or otherwise), the expression "the Guarantor" shall include all such persons and the liability of the Guarantor under this guarantee shall be the joint and several liability of such persons and any demand for payment made by Simple Pay to any one or more of the persons so jointly and severally liable shall be deemed to be a demand made to all such persons. Simple Pay may release or discharge any one or more of such persons from this guarantee or compound with or otherwise vary or agree to vary the liability of or to grant time or indulgence to or make other arrangements with any one or more such persons without prejudicing or affecting the rights and remedies of Simple Pay against any other of such persons."

16. The final page of the said agreement names the Applicant, and stipulates that his liability is limited to Kshs. 60,000,000/-. Further, his ID Number and KRA Pin Number are present on that page, and I note that the Applicant has executed the document at each and every page, and twice on the final page of the said Personal Guarantee.

17. Having reviewed the above documentation, I am not persuaded by the explanation put forward by the Applicant. The said agreement is express. It plainly states that liability of the 3rd Defendant as a Guarantor is jointly and severally liable, which to my mind, means that the Plaintiff is at liberty to elect to recover the whole amount from any of the Defendants herein.

18. The Applicant has not alleged duress, and no evidence of duress has been demonstrated by way of evidence. Therefore, based on the record, it would appear, the Applicant voluntarily executed the document. I do not think that such a party may allege emotional and mental distress in circumstances



such as the present. The Applicant ought to have read the document and considered the legal implications of signing the same, before executing and appending his signature to the same.

19. In *Harrison Wanjohi Wambugu versus Felista Wairimu Chege & Another* [2019] eKLR, the court addressing itself to the subject of jointly and several liability stated as follows:-

“The concept of joint and several liability has been discussed in several decisions. In *Kenya Airways Ltd v Mwaniki Gichohi*, Milimani Commercial HCC 423/2002, the court said: “The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however, double compensation is not allowed and accordingly, whatever portion of the decree is recovered against one of such Defendant cannot be recovered from the other Defendant.”

20. Additionally, in the case of *Hellen Njenga versus Wachira Murage & Another* [2015] eKLR cited the decision in *Dubai Electronics versus Total (K) Ltd & 2 others* HCC Nairobi CC 870/98, the court stated:-

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the Plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the Defendants are entitled to reimbursement from the co-Defendants in the event that the Plaintiff only opts to recover from one of them. That is my understanding of joint and several liability.”

21. Guided by the above, I am persuaded that the Applicant is a necessary party to the proceedings because he jointly and severally executed Personal Deeds of Guarantees and Indemnities, unconditionally guaranteeing to discharge the repayment obligations arising out of the loan.
22. Based on the reason set out above, I find that the Application is without merit. The same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 6TH DAY OF MAY, 2025

ALEEM VISRAM, FCIARB

JUDGE

In the presence of;

.....Court Assistant

.....Plaintiff

.....1st Defendant

.....2nd Defendant

.....3rd Defendant

.....4th Defendant



.....5th Defendant

.....6th Defendant

