



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 414 OF 2017

STANDARD CHARTERED BANK OF KENYA LIMITED..PLAINTIFF

VERSUS

JUJA COFFEE EXPORTERS LTD.....1ST DEFENDANT

ISHA TAHIR SHEIKH SAID.....2ND DEFENDANT

NOOREIN TWAHIR SHEIKH SAID.....3RD DEFENDANT

OSMAN TAHIR SHEIKH SAID.....4TH DEFENDANT

TAUHIDA TAHIR SHEIKH SAID.....5TH DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....6TH DEFENDANT

RULING

INTRODUCTION.

1. Through the plaint filed on 6th October 2017, the plaintiff herein, Standard Chartered Bank of Kenya Limited, sued the defendants jointly and severally seeking the following orders:-

a. Kshs 149,873,027.05 together with further interest at 14% per annum from September, 2017.

b. US\$2,637,285.25 together with further interest at 7% per annum from September, 2017.

c. Costs.

2. The plaintiff's case is that by a facility letter signed between it and the 1st defendant on 26th April 2012, the plaintiff agreed to grant the 1st defendant banking facilities which were then secured by various securities and guaranteed by the 2nd, 3rd, 4th and 5th defendants.

3. The plaintiff states that the 1st defendant failed to repay all the sums due and that after numerous correspondence between the plaintiff and the defendants herein, the 6th defendant undertook to take over the amount due from the 1st defendant upto a maximum of USD 25,600,000 but that no payments were made.

4. The 2nd to 5th defendants filed their joint statement of defence wherein they deny the plaintiff's claim and state that no money was advanced to the 1st defendant and neither were the guarantees signed by the 2nd-5th defendants as alleged.

5. Through the statement of defence filed on 15th December 2017, the 6th defendant admits that it held negotiations with the plaintiff and NIC Bank with a view to taking over the banking facilities that had been extended to the 1st defendant. It states that the 6th defendant informed the plaintiff that together with NIC Bank, they would repay to the plaintiff the amounts due from the 1st defendant whose balance

stood at a total of USD 26,162,607.38 as at 9th June 2014. The 6th defendant states that the undertaking was that the maximum limit of USD 25,600,000 covered both the 6th defendant's and NIC Bank's undertaking a portion of USD 18,000,000 thereby making the 6th defendant's exposure to the plaintiff to be USD 7,600,000.

6. The 6th defendant maintains that it paid the full and final share of its exposure of USD 7,600,000 to the plaintiff and is not therefore indebted to the plaintiff as alleged.

Application.

7. Through the application dated 14th December 2017, the plaintiff seeks orders that judgment be entered against the 6th defendant as prayed in the plaint. The plaintiff also seeks the costs of the application.

8. The application is supported by the affidavit of the plaintiff's accounts Manager Group Special Asset Management **Ms Stella Mburu** who reiterates the contents of the plaint and the negotiations that took place between the plaintiff, the 1st defendant, the 6th defendant and NIC Bank for the payment of the money due to the plaintiff by the 6th defendant and for the takeover by the 6th defendant and NIC Bank of the Debenture and charges which the plaintiff held by way of security.

9. She avers that following the said negotiations NIC Bank paid to the plaintiff USD 18,000,000 under its undertaking while the 6th defendant paid USD 7,599,947.00 out of its undertaking of USD 7,600,000 thereby leaving an outstanding balance of kshs 107,109,434.00 and USD 2,247,627 that is the subject of this suit and application.

10. The 6th respondent opposed the application through the replying affidavit of its head of Credit Remedial, Collections and Recoveries **Mr. Eustace Nyaga** who avers that the 6th defendant's statement of defence raises triable issues which should go for adjudication. He avers that the 6th defendant was not privy to the business transactions between the plaintiff and the 1st defendant and that the plaintiff's claim of the 6th defendant's alleged indebtedness is not merely denied but that the 6th defendant elaborately and clearly outlined the extent of its maximum liability to the plaintiff under the undertaking.

11. He further states that the 6th defendant's statement of defence is not a mere sham as the 6th defendant has gone an extra mile to explain its position regarding the plaintiff's case in a manner that leaves no doubt that the parties points of divergence will require the court's determination.

12. Parties filed their respective submissions and list of authorities to the application which I have carefully considered.

13. The main issue for determination is whether the application meets the threshold for granting of orders for summary judgment against the 6th defendant.

14. Courts have taken the position that summary judgment is a drastic remedy which may only be granted in the clearest of cases in which there is no bonafide defence to the plaintiff's claim. In **Moi University v Vishva Builders Limited** CA No. 296 of 2004 (unreported) it was held:

*“The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one trial issue would be sufficient – see **H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.A.C.A 89**. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in **Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-***

*“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as **SHERIDAN, J** put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”*

15. Similarly in **Postal Corporation of Kenya v Inamdar & 2 Others** [2004] I KLR 359 it was held:

*“However, we have accepted that the application that was before the learned Judge was an application for summary judgment under order XXXV rules 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court's decision in the case of **Continental Butchery Limited vs. Samson Musila Ndura, Civil Appeal No 35 of 1997** where this Court stated:*

With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of plaintiff under the summary procedure provided by order 35 subject to there being no triable issue which would entitle a defendant to leave to defend.

If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the

court feels justified in thinking that the defences raised is a sham.

That decision was made in 1997. In 1997, this court again confirmed the same principle in the case of Dhanjal Investments Limited vs. Shabana Investments Limited Civil Appeal No. 1232 of 1997 (unreported) where it stated:

“The Law in summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kundanlal Restaurant vs. Devshi & Company Limited 19 EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Friguerido & Co vs. Moorings Hotel (1959) EA 425 that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions.”

16. In the instant case, it was not disputed that the 6th defendant was not a party to the initial transaction between the plaintiff and the 1st -5th defendants. It was further not in dispute that the 6th defendant only came into the picture much later after the 1st defendant had defaulted in the loan repayments with a view of taking over the 1st defendant's loan under an arrangement/undertaking that included the participation of NIC Bank. The bone of contention between the parties however is the extent of the 6th defendant's liability under the undertaking. While the plaintiff contends that the 6th defendant and NIC Bank undertook to take over the 1st defendant's debt of a combined aggregate of USD 43,600 with NIC taking over USD 18,000,000 and the 6th defendant paying USD 25,600,000, the 6th defendant maintained that the undertaking was for the total aggregate of USD 25,600,000 with NIC Bank taking 18,000,000 and the 6th defendant paying USD 7,600,000 which the 6th defendant stated that it paid in full. I note that the plaintiff does not deny that on 28th April 2015 the 6th defendant paid it the sum of USD 7,600,000.

17. A perusal of the pleadings filed by both parties shows that the parties engaged in numerous correspondences prior to the subject undertaking by the 6th defendant and NIC Bank to take over the 1st defendant's loan with the plaintiff. The said correspondence is captured in part, at paragraph 13, 14, 15 and 16 of the plaintiff supporting affidavit as follows: -

13. On 30th March, 2015 the plaintiff received from the sixth defendant a payment of US\$7,599,947.00.

14. On 28th April, 2015 Hamilton Harrison & Mathews wrote to Miller & Company as advocates for the six defendant requesting payment of the outstanding balances due under the sixth defendant's undertaking. A copy of the letter is at pages 99 to 100 of the plaintiff's bundle of document filed herein on 6th October 2017.

15. By letter dated 4th May 2015 the sixth defendant wrote to Hamilton & Mathews alleging that the maximum liability of the sixth defendant under its undertaking was US\$7,600,000.00 which sum had already been paid and that the balance due to the plaintiff should be recovered from the first defendant. A copy of the letter is at page 101 of the plaintiff's bundle of documents filed herein on 6th October 2017.

16. Miller & Company wrote to Hamilton Harrison & Mathews on 5th May, 2015 in similar terms. A copy of the letter is at pages 102 to 103 of the plaintiff's bundle of documents filed herein on 6th October 2017.

18. From the plaintiff's own admission of what the dispute between the parties herein is all about, which is the interpretation of the 6th defendant's undertaking, this court finds that this is not a clear case that lacks a bona fide defence as there is the pertinent issue of the interpretation of the terms of the 6th defendant's undertaking in order to determine the actual extent of its liability to the plaintiff. I note that both parties have advanced their own views/interpretation of the extent of such liability. In my humble view, this is an issue that will require evidence to be adduced before a final determination can be made.

19. For the above reasons, I find that the application does not meet the threshold set for application for summary judgment and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 21st day of May 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ondieki for the plaintiff

No appearance for defendant

C/A & DR – Hon. Wanyama