



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

CIVIL CASE NO. E 068 OF 2019

FIRST COMMUNITY BANK LTD.....PLAINTIFF/RESPONDENT

VERSUS

MAHADI ENERGY LIMITED.....1ST DEFENDANT/APPLICANT

IBRAHIM HUSSEIN MAHADI.....2ND DEFENDANT/APPLICANT

DOR MOHAMMED DOR.....3RD DEFENDANT

ABDI HASSAN AMIN.....4TH DEFENDANT

ADAN ABDULLAHI ALLOW.....5TH DEFENDANT

RULING

BACKGROUND

The Plaintiff filed suit through Plaint on 4th April 2019 against the defendants for Ksh 535,838,627.69/- with interest at 14% per annum until payment in full and any other relief the Court may deem fit to grant.

The 1st Defendant was/is sued as principal debtor and 2nd -5th Defendants are sued as guarantors. By letters of offer of 12th October 2011; 3rd November 2011 and restructuring letter of offer of 21st November 2016, the Plaintiff advanced to the defendants Ksh 392,127,838.35/-. The 1st Defendant Company and 3rd 4th & 5th Defendants Directors provided securities in form of charges on land parcels, composite debenture and guarantees as securities for the loan facility.

Summons to enter appearance were issued to the Plaintiff to effect service. The Affidavit of Service filed on 24th April 2019 outlined the service process to the Defendants. The Defendants failed to enter appearance within the requisite period. The Plaintiff requested for Interlocutory judgment on 24th April 2019. The judgment was entered and decree processed on 29th April 2019.

APPLICATION FILED ON 13TH MAY 2019

The 1st and 2nd Defendants/Applicants filed Certificate of Urgency Application dated 10th May 2019, urging the court to hear this matter on priority basis on grounds;

1. The judgment obtained by the Plaintiff herein is irregular and unlawful. The same was procured through deliberate non-disclosure and mis-representation of material facts. The Court would not have entered the judgment herein if it was notified that the Defendant was in fact not served and that the Plaintiff had prior to the filing of this case issued Statutory Notices under **Section 90 of the Land Act 2012** and was actively involved in the process of realizing the securities charged to it in respect of the subject facility.

2. The Plaintiff/Respondent deliberately failed to disclose to the court that it was precluded from proceeding with the subject case as

a normal suit by virtue of the express provisions of **Section 91 of the Land Act** and that the value of the charged properties substantially exceeded the facilities herein.

3. The subject *ex parte* judgment is in the face of it irregular and unlawful for *inter alia* awarding a prayer for an alleged return rate of 14% which is not applicable in an Islamic “Musharaka Facility” and making awards for unconscionable interest/profit of Ksh 143,710,789.34 which is neither contractual nor a justifiable remedy in law.

By Notice of Motion application dated 10th May 2019 annexed to the Certificate of Urgency brought under **Article 50 and 159 (d) of the Constitution, Section 91 (2) of the Lands Act 2012, Sections 1A, 1B, 3A and 63E, 94 the Civil Procedure Act, order 10 Rule 11, and order 51 Rule 1 of the Civil Procedure Rules 2010**, this Court’s inherent jurisdiction and all the enabling provisions of the law. The Applicants sought orders;

- a) The execution of the judgment entered herein in default of appearance together with all the consequential decree, orders, proclamation, attachment and processes thereto be stayed, suspended and/or lifted pending *inter partes* hearing of this application.
- b) This Court be pleased to discharge and/or set aside the interlocutory judgment entered herein in default of appearance and all the consequential decree, orders and processes attendant thereto.
- c) This Court be pleased to consolidate this matter with **Nairobi High Court Commercial Case No. E 066 of 2019 & E 108 of 2019** between the same parties herein and allow the matters to proceed for full hearing on merit.

The application was based on grounds that;

1. Summons to enter appearance together with the suit papers were never served upon the Defendant/Applicant, who only learnt of the case and the judgment therein on 8th May 2019 when the Plaintiff served him with a Preliminary Objection and an application in a similar case between the same parties and pending before this Court being **Nairobi High Court Comm. Case No. E 108 of 2019**.
2. Further to the above, the Plaintiff deliberately misled the court that there have not been other proceedings before this court with respect to the same subject matter herein, a fact the Plaintiff knew to be false since the Plaintiff and the Defendants had previously been involved in **Nairobi High Court Comm. Civil Suit No. 117 of 2017 – Ibrahim Hussein Mahadi & Others -vs- First Community Bank & others**.
3. The Plaintiff also failed to disclose that it had filed another case between the same parties herein and arising from the same subject matter being **Nairobi High Court Comm. Civil Case No. E066 of 2019 – First Community Bank Ltd -vs- Ibrahim Hussein Mahadi**.
4. The issues subject of this suit had been extensively addressed in **Nairobi High Court Comm. Civil Suit No. 117 of 2017 – Ibrahim Hussein Mahadi & Others – vs- First Community Bank & Others**, wherein a Deed of Settlement was executed between the parties herein which Deed of Settlement and the terms therein was the basis of the current case between the parties being **Nairobi High Court Comm. Civil Suit No. E108 of 2019 - Ibrahim Hussein Mahadi & Another -vs- first Community Bank Ltd**.
5. The issues subject of this suit are the same and similar issues being considered by this Court in **Nairobi High Court Comm. Civil Suit No. E108 of 2019 – Ibrahim Hussein Mahadi & Another -vs- First Community Bank Ltd** and also in **Nairobi High Court Comm. Civil Suit No. E066 of 2019. – First community Bank Ltd -vs- Ibrahim Hussein Mahadi & others**. The matters are between the same parties, arise from one similar transaction and ought to be heard and determined together.
6. The defendants further relied on the holding in the case of; **In Sebel District Administration -vs- Gasyali & others (1968) E.A. 300**, the court held that;

“the court should not solely concentrate on the poverty of the Applicant’s excuse for not entering appearance or filing a defense within the prescribed time. The nature of the action should be considered, the defense if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to delay the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A Defendant should be ordered to pay costs to compensate the Plaintiff for any delay occasioned by the setting aside and be permitted to defeat.”

SUPPORTING AFFIDAVIT

The application was supported by an affidavit dated 10th May 2019, sworn by Ibrahim Hussein Mahadi, the 2nd Defendant/Applicant herein. He stated that sometimes in the year 2017, a dispute arose between the parties with respect to the advanced financial facilities which dispute led to the filing of **Nairobi High Court Civil Suit No. 117 of 2017 – Ibrahim Hussein Mahadi & Others -vs- First Community Bank Ltd & Others**.

He averred that the parties resolved the above dispute through a Deed of Settlement dated 26th July 2017 (“**Deed of Settlement**”) and the court case was subsequently marked as withdrawn in terms of the Deed of Settlement vide the Consent Order dated and filed in court on 7th August 2017. The Consent Order was adopted as an order of the court on 1st November 2017.

That pursuant to the said Deed of Settlement, 1st and 2nd Defendants were obligated to enter into a tripartite agreement with an entity known as APM terminals Kenya Limited (“**the Licensee**”) and the Plaintiff Bank by which the 1st Defendant would in consideration of payment of rent, license to the Licensee the 1st Defendant’s Container Handling Depot.

That it was a term of the Deed of Settlement that the proceeds of the monthly rent received from the Licensee would be paid directly to the Plaintiff and utilized towards servicing the loan with the Plaintiff Bank.

That in compliance with the terms of the Deed of Settlement, they entered into the above tripartite agreement on 26th July 2017 with the effective date being the 21st August 2017. In compliance with the agreement, the Licensee paid to the Plaintiff Bank a monthly sum of Ksh 5,000,000/- towards liquidating the 1st Defendant’s bank facility.

That the foregoing facts were within the Plaintiff’s knowledge and the Bank was present and fully participated in the handing back of the container depot and took cognizance of its sorry state of disrepair.

That despite being fully aware of the foregoing and having participated in the termination of the license agreement and the handing back of the container handling depot, the Plaintiff Bank on or about the 7th January 2019 served the Defendants with a **90-day statutory notice** requiring them to service the loan account.

That due to the foregoing and the refusal of the Licensee to repair the Depot, the Plaintiffs were forced to source for funds to repair the container handling Depot wherein they have since used Ksh 21 million and fully repaired the container handling Depot. Mahadi Energy Limited has procured 10 tractors and 10 trailers at a cost of Ksh 8 million and are in the process of finalizing the repairing the container handling equipment to enable them commence the business operations. The Applicants estimate the outstanding issues to cost at least Ksh 14 million whereafter the business will commence operations and place the Plaintiffs in a position to service the loan account without default.

That the above developments forced the Applicants to move to court to seek protection from the Plaintiff’s unfair resolve to irregularly dispose of their properties. The Applicants therefore filed **Nairobi High Court Comm. Civil Suit No. E108 of 2019 – Ibrahim Hussein Mahadi & Another -vs- First Community Bank Ltd** on 30th April 2019 and served the same upon the Plaintiff on 2nd May 2019.

That on 8th May 2019, the Plaintiff/Respondent filed an application in **Nairobi High Court Comm. Civil Suit No. E108 of 2019 – Ibrahim Hussein Mahadi & Another -vs- First Community Bank Ltd** wherein it attached documents indicating that it filed this case on 5th April 2019 and on 29th April 2019 proceeded through unconventional and irregular means, to obtain *ex-parte* judgment in default of appearance against the Defendants or a colossal sum of Ksh 535,838,627.69/- without any service and/or notifying the Defendants of the suit.

REPLYING AFFIDAVIT FILED ON 28TH MAY 2019

The application was opposed vide an affidavit dated 17th May 2019, sworn by Claris Ajwang Ogombo, Legal Officer of the Plaintiff Bank. The Officer deposed that the Plaintiff was allowed under **Section 91 of the Land Act 2012** to institute suit for recovery if the defendant is personally bound to repay by virtue of the guarantees by the defendants.

That, the truth of the matter is that the Defendants borrowed money from the Plaintiff individually and through other 4 entities namely;

- i) Mahadi Energy Limited
- ii) Mahadi Oil Kenya Limited
- iii) Ray Engineering Construction Company International Ltd
- iv) Samiras Development Co. Ltd
- v) Ibrahim Hussein Mahadi

The Legal Officer deposed that most of the securities are common to the above entities obtaining facilities from the Plaintiff Bank because of their value. The Officer asserted that through a letter of offer dated 13th December 2016 and duly accepted by the 2nd Defendant, the Plaintiff extended financial facilities to the 2nd Defendant which now stand arrears of Ksh 107,484,907.27/- which the 2nd Defendant has refused to pay and he wants the court to assist him in continued refusal. The securities given by the 1st Defendant include:

- i) L. R. No. 209/5082
- ii) L. R. No. 23381

Both registered in the name of the 2nd Defendant annexed herewith and marked **CAO2** is a copy of letter of offer.

That through a letter of offer dated 12th October 2011 and a restructuring letter of offer dated 21st November 2016 and duly accepted by the 1st Defendant, the Plaintiff bank extended financial facilities to the Defendants which now stand in arrears of Ksh 535,838,627.69/-. The Defendants together have refused to settle and the Plaintiff bank continues to count losses on the public money lent. The securities given by

2nd Defendant include the following;

- i) L.R. No. 209/5082
- ii) Nairobi/Block 103/424
- iii) L. R. No. 209/2389/95
- iv) L.R. No. Mainland North/Section VI/468 and subdivision 998
- v) L. R. No. 2428/VI/MN C.R. 14493

Annexed are the letters of offer marked **CAO3**.

That the Defendants, through another entity known as Ray Engineering & Construction Company International Limited borrowed money from the Plaintiff through a letter of offer dated 3rd November 2011 and there are two subsequent restructuring letters of offer dated 21st November 2016 and 9th December 2016 respectively and duly accepted by the Defendants.

In this transaction, the Plaintiff extended financial facilities to the Defendants which now stand in arrears of Ksh 460,391,362.26/-. The securities furnished by the Defendants include:

- i) L.R. No. 3734/252 (No. 3734/5/159) Nairobi
- ii) Joint registration of motor vehicle registration Nos. KAJ 103Z, KAV 636V, KAY 386E and KAZ 890Z.
- iii) L.R. No. Mainland North Section VI/4689 and Subdivision No.998.
- iv) L.R. No. Kajiado/iidamat/116 and 1172
- v) L.R. No. Kajiado/iidamat/1209-1226
- vi) Guarantees by the Defendants

That the Defendants, through another entity known as Mahadi Oil Kenya Ltd borrowed money from the Plaintiff through a letter of offer dated 3rd November 2011 and subsequent restructuring letter of offer dated 21st November 2016 and duly accepted by the Defendant.

In this transaction the Plaintiff extended financial facilities to the Defendants which now stand in arrears of Ksh 238,338,071.90/-. The securities furnished by the Defendants include;

- i) An all assets debenture of the Plaintiffs' assets
- ii) L.R. No. 209/2389/95
- iii) L.R. No. Nairobi/103/424
- iv) L.R. No. 25764, Nairobi
- v) Personal and corporate guarantees of the Defendants

That the Defendants, through another entity known as Samiras Development Company Ltd, borrowed money from the Defendant through a letter of offer dated 5th September 2012 and subsequent restructuring letter of offer dated 21st November 2012 and duly accepted by the Defendants. In this transaction the Plaintiff extended financial facilities to the Defendants which now stand in arrears of Ksh 376,522,209.62/-. The securities furnished include;

- i) An all asset debenture
- ii) L.R. No. Mainland North/Section VI/4689 and 998
- iii) L.R. No. 2428/VI/MN/CR 14493
- iv) Rental assignment over L.R. No. mainland North/Section VI/4689,988 and 2428/VI/MN (C.R 14493)
- v) Joint registered Motor Vehicle registration number KBK 200K

vi) Personal and corporate guarantees.

The Deponent disclosed that on realizing that the debts had become unbearable the Directors of the 1st Defendant, who included the 2nd Defendant on 2nd February, 2016 passed a resolution authorizing the Plaintiff to realize the securities through sale of LR No Mainland North Section VI/4689 & Subsection Number 998 both registered in the name of the 2nd Defendant. Annexed is a copy marked **CA07**.

APPLICATION FILED ON 7TH JUNE 2019

The Plaintiff/Applicant filed certificate of urgency on the following grounds;

That it emerged that the 1st Defendant did not authorize the 2nd Defendant to defend the suit and majority shareholders deposed affidavits to that effect and were annexed as attachments which the Court expunged from the record as they could only be legally filed separately as Defendants and not with Plaintiff Bank.

That in place is a Company resolution prohibiting the suit against the Plaintiff and allowing the Plaintiff to realize the securities held for the money owed to the Plaintiff.

That the issues raised in the instant application were to be dealt with first;

The Notice of Motion was brought under **Order 2 Rule 15(d), Order (Rule 2(c), Order 51(1) of CPR Section 3A of CPA** sought to strike out the Defendants application of 10th May 2019 and that the Defendants be condemned to pay costs personally. The Application was premised on the following grounds;

- a) There is no resolution of 1st Defendant Company approving that the suit be defended and approving the Defendant's Law Firm to commence any suit on or behalf of the 1st Defendant Company.
- b) The 1st Defendant Company did not authorize the 2nd Defendant to depone an affidavit in support of the application. The Plaintiff/Applicant alleged that the mere fact of being a Director does constitute one as agent of the Company for purposes of the suit.

The 3rd Defendant, Dor Mohamed Dor filed an Affidavit on 8th July 2019 and 2nd August 2019 respectively. He deponed that he is one of the Directors of the 1st Defendant Company and annexed the certificate of Incorporation of 1st Defendant Company, its Memorandum and Articles of Association and the **CR-12 Form of 4th June 2019** which confirms the Directors of the 1st Defendant Company as;

- a) Adan Abdullahi Aliow
- b) Abdi Hassan Amin
- c) Dor Mohammed Mohammed Dor Mohammed.

The 3rd Defendant informed Court that the 2nd Defendant is not a Director of the 1st Defendant Company but has power of attorney from 5th Defendant/Director of the Company. The power of attorney is annexed to the Affidavit.

The 3rd Defendant deponed he is one of the guarantors of the loan advanced by Plaintiff bank to the 1st Defendant.

The 3rd Defendant deponed that the 1st Defendant passed a resolution to have the Plaintiff bank realizes its facility to the Defendant Company by realizing the securities. This is because of the default in payment caused them to incur arrears which were large. The resolution is annexed to the Affidavit filed on 2nd August 2019. It reads in part as follows;

“The Resolution was adopted by Board of Directors of Mahadi Energy Limited at a special meeting of Board of Directors held on the 2nd February 2016 in accordance with Memorandum and Articles of Association of the Company.

PRESENT

Ibrahim Hussein Mahadi.....Director

Hussein Hassan Hussein.....Director

Dory Mohammed Mohammed.....Director

Be it Resolved by Board of Directors of Mahadi Energy Limited as follows;

1. That Mahadi Energy limited has liabilities at First community Bank Limited arising from various facilities advanced to it from time to time.

2. That the said facilities are now overdue and the bank wishes to realize facilities through sale of LR Mainland North Section VI/4689 & Subdivision 998 both registered in the name of Mahadi Energy Limited and charged to the Bank.

3. The Company hereby gives the Bank authority to sell properties as transfer by Chargee by private treaty in recovery of those facilities.

.....

Signed by Directors on 2nd February 2016 and sealed by Company Seal.”

The 4th Defendant Abdi Hassan Amin by a Power of Attorney annexed to the Affidavit by Hussein Hassan Amin who by virtue of the said Power of Attorney represents the 4th Defendant. He deposed that the 1st Defendant Company passed a resolution to allow the Plaintiff sell the securities to realize the debt due and owing.

The 2nd Defendant who represents the 5th Defendant vide a power of Attorney too, had no authority to defend the claim by the Plaintiff and had no such instructions to do so.

SUBMISSIONS/DETERMINATION

The parties through Counsel made comprehensive submissions to both applications which shall be considered in the Determination of the matter. After consideration of pleadings and submissions the issues that commend themselves for determination are as follows;

- 1) Where the defendants served with **Plaint and summons for entering appearance or not?**
- 2) Does the Court have discretion to set aside the Interlocutory judgment of 29th April 2020?
- 3) Have Defendants raised triable issues in the Draft Defence that afford the parties hearing and determination of the matter?
- 4) Should the Application of 10th May 2019 and/or the Application of 7th June 2019 be upheld or dismissed?

ANALYSIS

- 1) Were the defendants served with **Plaint and summons for entering appearance or not?**

The Defendant/Applicants submitted that summons to enter appearance together with suit papers were never served upon them. The Defendants learnt of the case and the judgment on 8th May 2019 when the Plaintiff served them with a Preliminary Objection and an application in a similar case between the same parties and pending before Court in HCCC E 108 of 2019.

The Defendants challenged the purported service of the **Plaint and Summons to enter appearance** on the ground that , the Plaintiff failed to controvert the same either through affidavit evidence or by availing the Process Server for cross- examination. The Defendants relied on the case of Moses Wanjala Lukoye vs Bernard Alfred Wekesa Sambu & 3 Others [2013] eKLR on provision of evidence in rebuttal.

The issue of service is provided by;

5 Rule 3 CPR - Service on a Corporation

Subject to any other written law, where the suit is against a corporation the summons may be served—

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—

i) by leaving it at the registered office of the corporation;

7. Service on several defendants

Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

8. Service to be on defendant in person or on his agent

(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

(2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.

The Plaintiff served the Defendants as follows;

The Process Server deposed in Affidavit of Service filed on 24th April 2019 that on 5th April 2019, he called **Mobile Number 0722381449** and 2nd Defendant responded. He asked him to meet with him on 3rd Floor Jamia Plaza on Kimathi Street. They met he introduced himself to the 2nd Defendant, one of the Directors of 1st Defendant Company and explained the purpose of the visit and served him with copies of the Plaintiff and summons. He said he would consult his lawyers. He then called 3rd Defendant on phone, who after 3 minutes came to his office.

The service to the 2nd Defendant both as one of the Directors of the 1st Defendant Company and directly as Defendant was legally and lawfully effected.

The Plaintiff's Process Server deposed the mode/process of service. It is for the Defendants to rebut by evidence. The 2nd Defendant's denial cannot hold true, he did not challenge the use of Mobile Number 0722381449 which is claimed to have been his contact and he was reached.

The Process Server deposed in the Affidavit of Service that upon calling the above mobile number and the 2nd Defendant spoke to him, he gave him directions of the Physical address as, 3rd Floor, Jamia Plaza Kimathi Street. He went and met him at 12.08 pm.

The Process Server would not have known the 2nd Defendant's physical address before they communicated on phone, otherwise, if he did there was no need to call him first and ask to meet him and then he went to the physical address, where he met him and served him Court documents.

It is more than coincidence that the said physical address happens to be the same as shown in the 1st Defendant's Company's letterhead papers filed with pleadings in this Court which were not filed at the time of filing suit before service of Court Process. The letter in question is one dated 6th May 2019 on Mahadi Energy Limited letterhead with Company Seal annexed to Replying Affidavit of 20th July 2019 by 2nd Defendant. The address is **Kigali Street Jamia Mosque 3rd Floor P.O. Box 17971, Nairobi Kenya.**

Sections 107-112 of Evidence Act, mandates that he who alleges must prove. Proof of a particular fact or special knowledge is proved by the person with such knowledge or awareness of the fact(s). The Plaintiff is not legally required to avail the Process Server unless and until the Defendants who refute the contents in the Affidavit of Service apply to Court to avail the Process Server for cross examination of the contents regarding service. This application was not made to Court by the Defendants and hence they cannot in the absence of tangible evidence to controvert the contents of the Affidavit be deemed to successfully contest service of Plaintiff and Summons to the 2nd Defendant.

See **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others [2014] eKLR** on burden of proof.

The Process Server would only have obtained such details from 2nd Defendant. The 2nd Defendant did not contest the physical address; that it was the wrong address; not being the office where he occupies or the Company's office, nor did he challenge the mobile number given as the one he responded to when the Process Server called him. In the absence of evidence to controvert the issue of service, this Court finds that the 2nd Defendant was properly served with Court process.

With regard to the 1st Defendant Company and proper service to the 2nd Defendant as one of the Directors of the Company is sufficient service.

The 3rd 4th & 5th Defendant were not served as required under **Order 5 CPR 2010**. Service was not effected directly to each Defendant personally, or to each Defendant's authorized agent or to each Defendant's advocate or the Summons affixed on the door of the offices of 1st Defendant Company or leaving the summons at the registered office of the Company as required by law outlined above.

A regular judgment was entered against the 1st & 2nd Defendants but not against 3rd 4th & 5th Defendants.

2. Have Defendants raised triable issues in the Draft Defense that afford the parties hearing and determination of the matter?

Secondly, The Defendants deposed that they have a good defense to the Plaintiff's suit as outlined in the Draft Defense annexed to the application, and contended that under **Article 50 & 159(d) of the Constitution** and **Sections 1A,1B & 3A & 63E of Civil Procedure Act & Order 10 Rule 11 of CPR**, they ought to be heard on merit.

The Defendants relied on the following caselaw;

Shah vs Mbogo (1967) EA 166

“this injustice to set aside an exparte judgment is intended to be exercised to avoid injustice of hardship resulting from accident, inadvertence and excusable mistake or error but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

Tree Shade Motors Ltd vs D.T.Dobie & Anor (1995-1998) IEA 324

“Even if service of summons is valid, the judgment will be set aside if [the] defense raises triable issues. Where the draft Defence was tendered together with an application to set aside a default judgment, the Court hearing the application was obliged to consider if it raised a reasonable defense to the plaintiff’s claim. Where the Defendant showed a reasonable defense on the merits, the Court could set the *exparte* judgment aside.”

See Also ***Sebel District Administration vs Gasyali & Others (1968) E.A. 300 & National Industrial Credit Bank vs Mutinda [2003]EA 194***; on the same point of the right to defend the suit.

The Defendant/Applicant raised the following issues in annexed Draft Defense to the application of 10th May 2019;

The Defendant stated that the Plaintiff obtained judgment irregularly and unlawfully. The judgment was obtained through deliberate non-disclosure and misrepresentation of material facts. The Court would not have entered judgment if it was disclosed that the Defendants were not served. That prior to filing this suit, the Plaintiff issued Statutory Notices under **Section 90 of Land Act 2012** and was actively in the process of realizing securities charged to it in respect of the subject facility.

The filing of the suit was also contrary to **Section 91 of Land Act 2012**.

The Plaintiff failed to disclose that there were other cases over the same subject-matter ***HCCC117 of 2017 Ibrahim Hussein Mahadi & Others vs First Community Bank; Nairobi HCCC E065,066,069 & 070- First Community Bank vs Ibrahim Hussein Mahadi & Others.***

The above case related to the following facts;

The Plaintiff and Defendants entered into a Deed of Settlement on 26th July 2017, where 1st & 2nd Defendants entered into Tripartite Agreement with APM Terminals Kenya. The Plaintiff received Ksh 5,000,000/- each month to liquidate the loan facility the 1st Defendant Company incurred. The Agreement expired on 30th November 2018. The Plaintiff bank moved to realize the securities for the outstanding loan facilities. The Defendants filed suit **Nairobi HCCC E108 of 2019**.

The Plaintiff failed to disclose that the financial facility herein formed part of a series of facilities issued under the *Musharaka* loan facility to the 1st Defendant for its development and operation of the Container Depot at Port of Mombasa. The alleged return of 14% is not applicable in the Islamic *Musharaka* facility and therefore **Ksh 143,710,789.34** is neither contractual or justifiable in law. The 1st Defendant actively serviced the subject loan and was in constant communication with the Plaintiff Bank.

The Plaintiff misled the Court that the securities supplied to the Bank were not sufficient when the plaintiff is fully aware that the securities are substantially developed and improved in particular Mombasa Container Depot which alone is valued at Ksh 3.4 billion as per attached valuation.

The application was filed pursuant to contested service of Plaintiff’s Plaint and Summons to the Defendants, there was no opportunity for the Plaintiff to disclose to the Court of the ongoing various cases filed from the processes and activities parties undertook. It is noteworthy, that at the earliest opportunity, parties through Counsel disclosed all Court files filed in relation to the disputes from the parties. This court vide its directions of 28th October 2019 was that all matters were to remain in their respective Courts for hearing and determination. So albeit later, the various Court cases were disclosed.

2a) Should the application of 10th May 2019 and/or application filed on 7th June 2019 upheld or be struck out?

The Plaintiff submitted by virtue of the application filed on 7th June 2019, that the 1st & 2nd Defendant’s application of 10th May 2019 ought to be struck out for the following reasons;

- a) The 2nd Defendant is not a Director of the Mahadi Energy Limited Company; he only has the Power of Attorney from his brother the 5th Defendant to represent him.
- b) The 2nd Defendant lacks requisite *locus standi* to swear an affidavit on behalf of the 1st Defendant Company as Mahadi Energy Limited did not the 2nd Defendant Ibrahim Hussein Mahadi to swear the Affidavit in support of the application.
- c) There is no resolution from 1st Defendant approving the Law Firm of Messrs Prof. Albert Mumma & Co Advocates to act for the 1st Defendant Company.
- d) The Application of 10th May 2019 filed on 13th May 2019 was filed in total disregard of the mandatory procedural requirements and in abuse of due process of the Court.

The Plaintiff relied on the following case-law;

Civil Appeal 42 of 2007 East African Safari Air Ltd vs Anthony Ambaka Kegode & Anor which referred to ***Royal British Bank vs Turquand*** held;

“While persons dealing with the a Company are assumed to have read the public documents of the Company and have

ascertained that the proposed transaction is not consistent therein they are not required to do more; they need [not] inquire into the regularity of the internal proceedings and may assume that all is being done regularly.”

The Applicant also relied on the Ruling by Hon. Tuiyot J of 27th September 2019 on the similar issue by almost similar parties; ***Ibrahim Hussein Mahadi & Mahadi Energy Limited vs First Community Bank***; where the Court referred to; ***Saraf Limited vs Augustot Arduin [2016] eKLR by C.A*** that reads;

“We know of no law that makes it a requirement for a limited liability Company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit.”

By Replying affidavit filed on 26th July 2019 by 2nd Respondent, he annexed authorization by Mahadi Energy Limited vide letter dated 25th July 2019 with the Company Seal authorizing the 2nd Defendant to sign documents on behalf of the Company. He instructed Counsel Mr. Charles Agwara of Messrs Prof. Albert Mumma & Co Advocates to represent and/or act for the 1st & 2nd Defendants in instant case.

Secondly, the application of 10th May 2019 is properly filed in this matter as it is an application of the 1st Defendant, the Company and 2nd Defendant the natural person, who exercised his legal right under the law to file the application and to choose legal representation.

Therefore, from the above submissions, the application by 1st & 2nd Defendants of 10th May 2019 is properly before the Court, as the defendants did not institute a suit but were/are sued and were served with Court process (although they contest service). They had to participate in the proceedings and reserve the right to appoint legal representation of their choice, the advocates on record. For these reasons, the Court shall not strike out the Application of 10th May 2019 but dismiss the application of 7th June 2019 to that extent of parties defending the suit filed against them.

2b) Does the Court have discretion to set aside the Interlocutory judgment of 29th April 2020?

In light of the claim as outlined in the Plaint, the Plaintiff deponed vide the Verifying affidavit Yahya Dahir, Corporate Director of the Plaintiff bank that they advanced the Defendants jointly and severally loan /overdraft facilities. The facilities are contained in letters offer of 12th October 2011, 3rd November 2011 and restructuring letter of offer of 21st November 2016. The total amount was/is Ksh 392,127,388.35/-. The loan/overdraft facilities were secured by charges over various suit properties, debenture and personal and corporate guarantees. The Defendants failed to settle the debt which continued to accrue profit and now stood at Ksh 535,838.627.69/-.The amount continues to escalate and attracts 14% return rate per annum.

POWER OF ATTORNEY

It is alleged and contested that the 2nd Defendant was/is not a director of the 1st Defendant Company as confirmed from its Memorandum & Articles of Association, with full power and authority to represent or defend the 1st Defendant. The 2nd Defendant, Ibrahim Hussein Mahadi, was appointed lawful Attorney and agent of Adan Abdallahi Aliow, one of the Directors of Mahadi Energy Limited through Power of Attorney, a copy annexed to the affidavit of Hussein Hasan Amin of 2nd August 2019.

The Power of Attorney from Adan Abdallahi Aliow to Ibrahim Hussein Mahadi reads in part as follows;

“The 2nd Defendant shall act] for him and his name and for his account and benefit to demand and recover dues owing, payable and belonging to him. If necessary in his name, the 2nd Defendant shall commence, prosecute, defend any action of actions, suits or torts al law and equity in any Courts of Kenya,[he] shall manage and transact ALL his affairs in Kenya and execute such deeds or instruments as may be necessary, or most to his advantage and to use all lawful ways and means thereto as fully and effectively to all intents and purposes as I might or could do if personally present and acting therein.”

It is argued that appointment as an agent, proxy or assignee does not clothe one with directorship as the Company ought to comply with **Section 138 of Companies Act**. However, **Section 34 of Companies Act 2015**

34. Power of directors to bind company

(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is free of any is limitation contained in the company's constitution.

(2) For purposes of subsection (1)—

(a) a person deals with a company if the person is a party to a transaction or other act to which the company is a party; and

(b) a person dealing with a company is not bound to enquire as to any limitation on the powers of the directors to bind the company or to authorise others to do so; is presumed to have acted in good faith unless the contrary is proved; and is not to be regarded as having acted in bad faith only because the person knew that a particular act is beyond the powers of the directors under the constitution of the company.

The Companies Act protects a party who in good faith engages in transaction with Directors of the Company. So even where assignment or appointment as member's proxy does not make one a director, as long as the 2nd Defendant held himself out as such and with knowledge approval or implied consent from Co directors, the Plaintiff bank's rights are protected by virtue of **Section 34 of the Act**, as the Directors action in executing loan agreement/letter of offer, bound the Company 1st Defendant.

SPECIAL RESOLUTION

This Court found from pleadings and annexures filed by parties that the 2nd Defendant executed on 2nd February 2016, as one of Directors of 1st defendant Company with Hussein Hassan Amin & Dory Mohammed Muhamed Co –Directors of Mahadi Energy Limited, a special resolution of the Company. It is annexed to affidavit of Hussein Hasan Amin of 2nd August 2019. The Directors jointly agreed that the 1st defendant Company incurred liabilities arising from various facilities advanced to the Company which are overdue. The 3 Directors authorized the Plaintiff Bank to realize these facilities through sale of the suit properties registered in the name of Mahadi Energy Limited 1st Defendant.

Section 257 (4) (b) of Companies Act

(4) A resolution passed at a meeting on a show of hands is passed by a majority of not less than seventy-five percent if it is passed by not less than seventy-five percent of—

(a) the members who, being entitled to do so, vote in person on the resolution; and

(b) the persons who vote on the resolution as duly appointed proxies of members entitled to vote on it.

The Companies Act allows Directors and/or proxies to vote for Special resolution. So, if the 2nd Defendant was not Director of 1st Defendant by virtue of the Power of Attorney from his brother, 5th Defendant Adan Abdullah Aliow, this fact does not vitiate the validity of the Special Resolution as the 2nd Defendant voted and/or endorsed the resolution as proxy of 5th defendant entitled to vote. The 2nd Defendant's appointment vide Power of Attorney registered in 2013, participated, voted and endorsed the special resolution.

There is no evidence, claim or issue raised to suggest fraud, forgery, duress, undue influence or any other legal basis to vitiate a valid contract/Agreement by the 3rd 4th & 5th Defendants of the 2nd Defendant.

The Directors did not notify the Registrar of Companies of the alleged anomaly or report for investigation to law enforcement Agencies of the 2nd Defendant's imposition as Director of 1st Defendant Company.

With regard to validity of the 1st Defendant's resolution to the Plaintiff Bank because the 2nd Defendant is not a director of the 1st Defendant, this Court finds the contrary, the 2nd defendant is part and parcel of communication with Plaintiff Bank and obtained credit as Director of Mahadi Energy Oil, he guaranteed the facility by the Bank to the 1st Defendant Company, he negotiated for moratorium on repayments of facility to the loan vide letter of 16th January 2019 as Chairman of the 1st Defendant's board of Directors. He executed with Co Directors Special Resolution and signed Deed of Settlement. The fact of his name not being in the Memorandum and Articles of Association of the 1st Defendant Company is explained by the power of Attorney accorded to him by Adan Abdullahi Aliow whose name appears as one of the Directors in the Constitution documents of the said Company.

These 2 instances of the Power of Attorney and the special resolution signed by 2nd Defendant illustrate that the 2nd Defendant acted as one of the Directors of the 1st Defendant Company. He is responsible under the power of Attorney for the 5th Defendant's contractual obligations as Director of the Company. The obligations include the guarantee by 5th Defendant executed in the letter of offer.

It is not denied that the 1st Defendant owes the Plaintiff loan repayments in relation to the loan facility offered vide letter of 12th November 2011 and vide restructuring of the debt repayments vide letter of 21st November 2016 of the said debt remains due and owing,

The parties are bound by the terms of contracts they duly executed. The loan facilities were credited to the 1st Defendant's Accounts, part repayments were made but the debt has not been settled Ksh 389,600,597/=

GUARANTEE

Principles of Commercial Law by KI Laibuta Pg 228 defines a guarantee thus;

“A guarantee is defined as a special promise or undertaking constituted by a collateral agreement in which a person called a guarantor is held liable for the subject debt, default or miscarriage of another (called principal debtor) who is primarily liable for the subject debt. Breach of duty on the part of the party primarily obliged to act as guaranteed automatically creates secondary liability on the guarantor (or surety) under the contract. This secondary obligation arises and binds the surety only in the event of breach by the original debtor of the primary duty.”

The Creditor sued the Guarantors, Directors of the Principal debtor 1st Defendant Company to settle outstanding debt. The rights of a guarantor against the principal debtor include to compel the principal debtor to release him from liability under the guarantee before payment is due or payment is completed. The 2nd -5th Defendants did not do so and remain liable to settle the debt on behalf of the principal debtor

who defaulted in settling outstanding debt under guarantees contracted in the letter of Offer of 12th October 2011.

The Guarantors have legal right to recover all sums paid in satisfaction of the guarantee once paid from the principal debtor. The Directors/guarantors executed the letter of offer of 12th October 2011 and agreed to comply with the term of the contract that the loan facility would be secured in addition to the charges on Company's suit properties, to execute joint and several deeds of guarantee as Directors of Mahadi Energy Limited.

On 22nd May 2020, this Court sought from Counsel submissions on the issue of guarantee as it is the gist of the Plaintiff's claim in this suit. The Court received a Supplementary Affidavit of the 2nd Defendant that reiterated evidence already adduced in pleadings filed, Ruling of the Trial Court of 13th May 2020 in ***HCCC E 108 of 2019***.

Of interest was/is, an affidavit deposed on 22nd June 2011 by Abdi Hassan Amin shareholder and Director of Mahadi Energy Limited transferred 200 shares to Ibrahim Hussein Mahadi who received for whole value of shares as new Director and Shareholder of the Company from 16th June 2011. The Court wondered why the 2nd Defendant's Directorship or not is hotly contested while a copy of an Affidavit of transfer of shares of the 1st Defendant 5th Defendant to 2nd Defendant is now produced.

The Plaintiff filed Replying affidavit filed on 20th May 2019 and annexed the following documents;

1. Plaintiff's letter of 12th October 2011 to **Directors of Mahadi Energy Limited**; letter of offer for Musharaka Finance to the Company, Working Capital for the Business Operations **Ksh 130,000,000/=**

Security: a) 1st Charge of Ksh 170,000,000/- on properties; Subdivision 4689(original 41571/1) Section No VI Mainland North & Sub division No 998(Original640/1) of Section No V Mombasa.

Security: b) Joint & Several Deeds of Guarantee, duly executed by the Directors of Mahadi Energy Limited.

2. Plaintiff's letter of 3rd November 2011 to **Directors of Mahadi Oil Kenya Limited**; letter of offer for Mahadi Oil Kenya Limited Working capital for business operations.

Transaction Type: An investment Partnership whereby, the Investor provides Working Capital to another party in order to undertake a business activity, while profits are shared on a pre-agreed ratio.

Ksh 20,000,000/-

Security: a) Legal Charges over suit properties LR 209/5082 registered in the name of **Ibrahim Hussein Mahadi 2nd Defendant**; and Charges over Nairobi /Block 103/424 7 LR No 209/2389/95.

Security: b) Joint & Several Deeds of Guarantee of Ksh 20,000,000/=

Duly executed by **Directors of Mahadi Oil Kenya Limited** (2nd Defendant is one of the Directors of Mahadi Oil Limited as per annexed Company resolution.)

Plaintiff's letter of 21st November 2016 on banking facility to the 1st Defendant company with regard to restructure of the loan facility of Ksh 389,600,597/=

Security; a) Charges over LR Mainland North/Section VI/4689, Subdivision 998 & LR 2428/VI/MN CR 14493 all registered in the name of 1st Defendant Mahadi Energy Limited among other securities by Mvita Container Depot Limited shares, Debenture and Corporate guarantee.

Security; b) **Joint & Several deeds of Guarantee and indemnity executed by the 1st Defendant's Directors Dor Mohammed Dor, Abdi Hassan Amin and Adan Abdullahi Aliow.** (Ibrahim Hussein Mahadi by a General Power of Attorney from Adan Abdullahi Aliow is a Director of Mahadi Energy Limited)

The above documents are duly executed by the Company 1st Defendant, Mahadi Energy Ltd, the Principal debtor and the Directors of the Company. The Letter of 3rd November 2011 relates to Mahadi Oil Limited a principal debtor who is not a party to these proceedings. This Court cannot determine a matter where the party is not a party in these proceedings.

In the case of ***Ebony Development Co Ltd Vs Standard Chartered Bank Ltd*** it was held;

“The security of charge is a guarantee. The obligation of a guarantor is clear. It becomes liable upon default by principal debtor.....

The 3rd & 4th defendants contention that 2nd Defendant is not a Director of 1st Defendant Company and could not represent the Company is not borne out by evidence on record.

HCCC117 OF 2017 & HCCCE108 OF 2019

This Court's attention was drawn to the following facts;

a) That 2nd, 3rd & 4th Defendants as Directors of the 1st Defendant Company resolved by Special Resolution on 2nd February 2016, they authorized the Plaintiff Bank that the liabilities due and owing to the Plaintiff bank be realized through sale by private treaty of LR Mainland North Section VI/4689 and subdivision 998 properties both registered in the name of the 1st Defendant Company; Mahadi Energy Limited.

b) Parties filed ***HCCC 117 of 2017 Adan Abdullahi Aliow, Ibrahim Hussein Mahadi & Mahadi Oil Kenya Ltd vs 1st Community Bank, Abdi Hassan Amin & Hussein Hassan Amin***. The suit was withdrawn on 7th August 2017 in terms of the **Deed of Settlement** of 26th July 2017. Of relevance to the 1st Defendant Company is that it is one of the sister Companies that engaged the plaintiff Bank in bank customer relationship and had been advanced loan facilities at the time it stood at Ksh 393,927,837.59/-.

The 1st Defendant Company among the other Companies defaulted in its payment obligation and the Plaintiff Bank commenced the process of realizing its statutory right of sale by issuing statutory notices to customers.

It was agreed that Mahadi Energy Limited would enter into a tripartite agreement with APM Terminals Kenya Ltd the Licensee and the Plaintiff Bank in consideration of payment of rent, the Licensee would be licensed a Container Depot situated on the securities. The Proceeds of monthly rent would be applied towards the customer's indebtedness to the Plaintiff Bank.

The 1st Defendant paid Ksh 5,000,000/- to the Plaintiff Bank through licensing fees monthly to reduce the debt until the License Agreement expired 30th November 2018.

c) On 20th December 2018, the Directors of Mahadi Energy Ltd were served with Statutory Notice under **Sections 90 & 96 of the Land Act** over the charged properties.

d) These are the issues pending for hearing and determination in **HCCC E 108 of 2019**.

I have outlined these matters as instant issue before this Court is to enforce guarantees by the defendants due to default by Principal debtor, but there are parallel processes to satisfy outstanding debt that impact on these proceedings and ought to be taken into account in decision-making.

At this stage, the Court notes that validity of Deed of Settlement of 26th July 2017, the process of exercising statutory power of sale by the Plaintiff Bank, the debt due and owing from the defendants and /or other related sister Companies are matters awaiting determination in matters filed in other Courts. It should be noted that as per this Court's order of 28th May 2019 where consolidation of all cases was sought, the other matters are to be heard and determined in other Courts within the Division.

CONCLUSION

Therefore, the Court is satisfied that the 2nd Defendant was duly served with the Plaint and Summons on his behalf as Director of the Company and the 1st Defendant Company. There is ample evidence to confirm indebtedness of the 1st Defendant from facilities advanced by the Plaintiff Bank.

There is evidence the 1st Defendant Company serviced the loan facility but remains with amounts due and owing.

The 2nd Defendant is a guarantor of the 1st Defendant Company and was duly served but did not file Defence within the statutory period. The debt is not denied save for the issue of interest.

INTEREST

The Letter of offer by the Plaintiff bank to the 1st Defendant Company on Musharaka Financing duly executed by Directors of 1st Defendants, set out in **Clause 2 (d) (e) & (f) of the Musharaka Financing Agreement**, the terms. They included the loan facility of Ksh 130,000,000/- Rate of Return At 12% per annum of the total facility investment to be paid after 36 months or at the termination of the Musharaka Agreement.

Clause 7 included Legal Costs and Expenses.

Clause 21 on payment of interest provided;

The parties hereby recognize and agree that the payment of interest is repugnant to the principles of Sharia and accordingly to the extent that any legal system would impose any obligation to pay interest, the parties hereby irrevocably and unconditionally expressly waive and reject any entitlement to recover any entitlement to recover interest from each other.

The Court in totality of pleadings and evidence finds that the Draft Defence at Pg 230 of the Defendant's Certificate of Urgency filed on 13th

May 2019 does not raise triable issues with regard to the guarantee by the 2nd Defendant on behalf of the Principal Debtor, 1st Defendant Company as there is the principal amount due and owing to date.

The Draft Defence discloses the chronology of events that culminated with various suits in relation to the subject-matter in various Courts.

However, in the instant matter this Court is satisfied that the Directors of Mahadi Energy Limited contracted with the Plaintiff 1st Community Bank on a loan facility to the Company of Ksh 130,000,000/- vide the letter of offer of 12th October 2011 and later letter of 21st November 2016 to restructure the debt repayment. In both letters it was a term of the contract and condition as part of security to the loan facility that the Directors of Mahadi Energy Limited would execute guarantees.

The 1st Defendant defaulted in settling the outstanding loan facility, the Plaintiff began to realize its securities by statutory power of sale which was halted pending hearing and determination in another Court. Meanwhile the Bank enforced the guarantee in relation to the 1st Defendant's Company's debt. These were the terms of the contract between the parties and are enforced as such.

In Pius Kimaiyo Langat vs Cooperative Bank of Kenya [2017]eKLR

It was held;

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

DISPOSITION

- 1. The application of 7th June 2019 is dismissed to the extent that the 2nd Defendant is not a Director of the Company but upheld to the extent of a valid Special resolution passed by the Defendants.**
- 2. The Application of 10th May 2019 is dismissed as a regular judgment was entered against the 1st & 2nd Defendants respectively.**
- 3. The Interlocutory judgment entered on 29th April 2019 against the Defendants is a regular judgment against 1st & 2nd Defendant as they were duly served with Plaint & Summons**
- 4. The Interlocutory Judgment entered on 29th April 2019 against the 3rd 4th & 5th Defendants was not regular as they were not properly and legally served with Plaint & Summons.**
- 5. The guarantee against the 2nd Defendant shall only be effected on terms of the guarantee by all directors of the Company and after reconciliation of accounts between the Plaintiff Bank and 1st Defendant Company and Defendant Directors of the Company on the Decretal Sum of Ksh 535,838. 627.69/- and include issues of ;**
 - a) Loan facility of Ksh 130,000,000/- granted to the 1st Defendant Company in letters of 21st October 2011 and 21st November 2016 and guaranteed by the 2nd – 5th Defendants.**
 - b) The Repayments by the 1st Defendant Company and payments from License Fees from Licensing agreement.**
 - c) Legal Costs & Expenses**
 - d) Rate of Return**
- 6. Also, to avoid double jeopardy to the 2nd Defendant, the enforcement of the Guarantee by the 2nd Defendant Ibrahim Hussein Mahadi on behalf of Mahadi Energy Limited shall await the outcome of HCCCE108 of 2019. The matter involves the Plaintiff's realization of the outstanding debt against the 1st Defendant Company, pursuant to the Special resolution, through statutory power of sale over the charged properties as security of the loan facility.**
- 7. There is the Corona Virus Pandemic Lockdown, no execution of the Court orders shall be undertaken until there is official announcement on return to normalcy.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH JUNE, 2020 (VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

PROF ALBERT MUMMA & CO ADVOCATES 1ST & 2ND DEFENDANTS

DR KENYARIRI & ASSOCIATES FOR PLAINTIFF BANK

ONGEGU & ASSOCIATES ADVOCATES FOR 3RD & 4TH DEFENDANTS

Mr. Agwara: We request for stay of execution and leave to appeal.

Mr. Kenyariri: A formal application for leave to appeal should be filed and not allow informal leave.

Mr. Agwara: There is no issue of formal application to be filed first

Dr. Kenyariri: We are not agreed on the way forward

Court: I have considered the matter/application and pending the release of the Ruling to the parties/counsel to consider their next action, the court grants 30 days stay of execution from today. Leave to appeal granted to parties/counsel.

M.W.MUIGAI

JUDGE