REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 218 OF 2018

CHANDARIA INDUSTRIES LTD.....PLAINTIFF

-VERSUS-

MALPLAST INDUSTRIES LTD.....DEFENDANT

RULING

Background

1. Through a plaint dated 22nd May, 2018 the plaintiff herein seeks the following orders:

i. Kshs. 22,057,729.71

ii. Interest at court rates from the date of filing suit until payment in full.

iii. Cost of this suit

iv. Any other relief that this Honourable court will deem fit.

2. A summary of the plaintiff's case is the claim that the plaintiff and the defendant entered into a contract to raise capital in the form of securities. It is alleged that the defendant issued two commercial papers of different denominations for purchase, by the plaintiff, for the total sum of Kshs. 60,000,000, exclusive of interest and withholding tax payable on the said commercial papers. The plaintiff duly negotiated the said promissory notes. The terms of the agreement were that the 1st promissory note dated 27th November, 2014 in the principal sum of Kshs. 35,000,000 together with gross interest of Kshs. 1,221,644 was redeemable after the expiry of ninety days while the 2nd promissory note dated 18th June, 2015 in the principal sum of Kshs. 25,000,000 together with gross interest of Kshs. 739,836 was redeemable after the expiry of 61 days. The plaintiff states that it was a term of the agreement that on the respective dates of maturity, the Defendant would redeem the promissory notes and pay the Plaintiff the face value of the promissory notes, to wit, the principal sum plus interest, and that any delays in payments would attract a penalty interest at the rate of 6% per annum. It is further alleged that by the mutual agreement of both parties, the promissory notes of Kshs. 35,000,000 and Kshs. 25,000,000 were converted into a loan.

3. On its part, the defendants contend that the Plaintiff's claim of Kshs. 22,057,729.71 is incorrect because the interest rates charged are excessive, not in good faith and are oppressive to the Defendant.

4. The Plaint is accompanied by the verifying affidavit of the Plaintiff's Chief Financial Officer one Bhavin Shah who avers that he is duly authorized by the directors of the Plaintiff company to make the dispositions and swear the affidavits on behalf of the company. The defendant filed a preliminary objection to the verifying affidavit on the basis that the verifying affidavit was not accompanied by the resolution of the company authorizing the Plaintiff's deponent to swear it.

5. On its part, the plaintiff filed a notice of motion application dated 23rd October 2018 in which it sought orders for judgment on admission against the defendant for the sum of Kshs. 22,057,729.71 plus interest and cost. Parties thereafter filed written submissions on the Notice of Motion and the Preliminary objection which submissions they highlighted during the hearing.

6. I have carefully considered the pleadings filed herein, the parties' submissions on the preliminary objection and the authorities that they cited. I note that the main issues for determination in this ruling are as follows:

a) Whether the suit as drawn is fatally defective for not being accompanied by a competent verifying affidavit on the ground of lack

of authority by the Plaintiff.

b) Whether the Plaintiff is entitled to judgment on admission.

7. On the issue whether or not the suit is defective, it was contended that there was no authority given by the Plaintiff Company authorizing the filing of these proceedings contrary to the provisions of the Civil Procedure Act. Order 4 rule 1(4) of the Civil Procedure Rules provides as follows:

> ***"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."***

8. I note that from the foregoing provision, it is not indicated that the authority given to the deponent of the verifying affidavit be filed together with the plaint. My take is that the failure to file the authority may only be a ground for seeking particulars regarding the same in the event the event that the authority does not eventually form part of the plaintiff's bundle of documents. My finding therefore is that while a suit filed without a resolution of a corporation may attract some consequences, the mere failure to file the same with the plaint does not invalidate the suit. I am guided by the decision of Kimaru, J. in **Republic v. Registrar General and 13 Others [2005] eKLR** wherein it was held that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing and that there is no requirement that the same be filed at the same time as the suit. The court further held that the absence of the resolution is therefore not fatal to the suit.

9. Courts have severally held that even where court action is commenced without authority, such action is capable of being ratified. This was the position taken by Hewett, J. in **Assia Pharmaceuticals v. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000** wherein it was held that:

> ***"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect……As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."***

10. Similarly, Ringera, J. (as he then was) in **Microsoft Corporation v. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460** expressed himself as follows:

> ***"According to the provisions of Order 3 Rule 2 an affidavit by a corporation can only be made by an officer thereof who is duly authorised by the corporation and this is a matter of substance and not form as it is incompetent for any other person howsoever conversant with the averments in the plaint he may be to make an affidavit on behalf of the corporation…..A person employed by a corporation with broad responsibilities is obviously an officer of the corporation as neither the Companies Act not Civil Procedure Act and the Rules have assigned the term "officer" any special meaning…….The failure by the deponent to state that she makes the affidavit with the authority of the corporation is a substantial defect which renders the said affidavit incompetent and courts its being struck out……A country manager is an officer of a Corporation on proper interpretation of Section 2 of the Companies Act, Cap 486 and by extension Order 3 Rule 2[c] of the Civil Procedure Act.....Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue……..The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record."***

11. In this case, the verifying affidavit was sworn by an officer of the Plaintiff Company, the Chief Financial Officer, who deposed that he had the requisite authority to swear the affidavit on behalf of the directors. I therefore do not find any defect in the said affidavit. Even if there was one, the Court would not have dismissed the suit merely on that ground since that defect does not, in this Court's considered view, go to the jurisdiction of the court as it is an omission which is capable of being cured.

12. On the second issue, the Plaintiff urged the court to enter judgment against the defendant on admission. The plaintiff contended that the admission of indebtedness was communicated through the Defendant's letter to the Plaintiff dated 22nd February, 2018. The question before this court is whether the said letter can *be deemed to be an unequivocal admission of the claim as submitted by counsel for the plaintiff. My reading of the defendant's statement of defence on the other hand reveals that it does not seem to evince any admission, but rather a joinder of issues.*

13. The principles of the law governing the processing of a summary judgment procedure are quite clear. In **ICDC V Deber Enterprises Ltd** [**2006] IEA75**, the Court stated-*inter alia,* as follows: -

> ***"The purpose of the proceedings in an application for summary Judgment is to enable the plaintiff to obtain a quick Judgment where there is plainly no defence to the claim."***

14. **In Kenindia Assurance Co. Ltd versus Commercial Bank of Africa & 2 others Nairobi CA No. 11 of 2000,** the Court stated that the law on summary procedure is now well settled and that this is a procedure resorted to in the clearest of cases. In **Dhanjal Investments Ltd versus Shabaha Investments Ltd Civil Appeal No. 232 of 1997** the Court went further and stated as follows on summary Judgment;

> "**The law on summary Judgment procedures has been** ***settled for many years now. It was held as early as in 1952 in the case of Kandanlal Restaurant versus Devshi & Company [1952] EACA77 and followed by the Court of Appeal for Eastern Africa in the case of Sonza Figuerido & Company Ltd Vs. Mooring Hotel Ltd [1929] E.A 424, that if the defendant shows a - bona-fide-triable issue, he must be allowed to defend without conditions….."***

15. As to what constitutes a triable issue, the Court in **Kenya Trade Combine Ltd versus Shah Civil Appeal No. 193 of 1991**, had this to say:

> ***"…… all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed. The defendant is at liberty to show, by whatever means he chooses whether by defence, oral evidence, affidavits or otherwise that his defence raises bonafide triable issues."***

16. Further in **Dedan King'ang'i Thiongo Vs Mbai Gatune Civil Appeal No. 292 of 2000**and **Banque Indosuez Vs DJ Lowe & Co. Ltd Civil Appeal No. 79 of 2002**, the Court was categorical that where *bona-fide*- triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant's right to defend the suit. Lastly, in **D.T. Dobie & Co. Ltd Vs Muchina & another [1982] KLR 1,** it was stated *inter alia*, that a pleading which does not disclose any reasonable cause of action or defence ought to be dismissed. Likewise, no suit ought to be summarily dismissed unless, it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption by way of an amendment.

17. In the instant case, I must point out that the test for and the procedure to be followed in an application for summary judgment is to ascertain if the defence raises a triable issue. In that regard, a single triable issue is enough to deny a claimant the summary process. The issue must however be a bona fide one, though it need not be one that must succeed at trial. Unlike applications for judgment on admission, a court proceeding under Order 36 is entitled to consider the merits of any defence raised.

18. In **Provincial Insurance Company of East Africa Limited** now known as UAP **Provincial Insurance Limited vs Lenny M. Kivuti**, Civil Appeal No. 216 of 1996 (unreported) the Court of Appeal stated: -

> ***"In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend."***

19. In the case of **Ideal Ceramics Ltd –v- Suraya Property Group Ltd HCCC No. 408 of 2016** (unreported), the court stated as follows:

> ***"[16] The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.***
>
> ***[17] The court's power to enter judgment on admission is discretionary: see Cassam vs. Sachania (supra). The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous: see Choitram vs. Nazari (supra) and Momanyi vs. Hatimy & Another [2003]2 EA 600. The admission ought to be obvious on the face thereof and leave no room for doubt.***
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> ***[18] An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made)."***

20. From the above cited authorities, it is clear that the guiding principle is that the remedy of summary Judgment is only available in the clearest of cases and that the burden is on the defendant to show that he has a *bona-fide* defence to the claim. In this case, without considering the merits of the defence which is not in this court's purview at this preliminary stage of the proceedings, it is clear that the Defendant denies various allegations made in the plaint thereby raising triable issues. I note that specifically at paragraphs 5 and 9 of the Defendant's defence, it denies owing the Plaintiff Kshs. 22, 057,729.71 and further denies that the terms in respect to interest rates were mutually agreed on and puts the Plaintiff to strict proof.

21. The Court of Appeal in **Joash M. Nyabicha vs Kenya Tea Development Authority KSM CA No. 302 of 2010 [2013] eKLR** held as follows: -

> ***"A plain reading of Order VI rule 9 (1) shows that an allegation in a pleading may be traversed expressly by the opposing party or there may be a joinder of issue under rule 10 of the same Order which joinder operates as a denial of the issue or issues.*** *(emphasis added).*
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> ***Rules 10 (1) and (2) read as follows: -***
>
> > ***(1) If there is no reply to a defence there is a joinder of issue on that defence***

(2) Subject to sub-rule (3) -

(a) there is at the close of pleadings a joinder of issue on the pleading last filed, and

(b) a party may in his pleading expressly join issue on the immediately preceding pleading.

The Court went on to state that -

"Having failed to file a defence to the counterclaim, there was a joinder of issue and not an admission which served to deny those allegations. It is only if the appellant had filed a defence to the counterclaim and failed to traverse the claims contained therein that an admission could be derived."

22. My humble view is that the assertions made in the defence go to the root of the Plaintiff's claim for summary judgment. The law is that one *bona-fide* issue is sufficient to entitle a Defendant to a right of defence. The Court is of the view that the disputed sum is a triable issue that will now require specific evidence to be proved. There is certainly more than one triable issue in this matter. This Court holds that the issues raised in the statements of defence by the Defendant are not a sham, frivolous or an abuse of the court process. They need to be fully ventilated and this can only be done by giving the parties a chance to be heard.

23. Having regard to the findings that I have made in this ruling, I find that both the preliminary objection raised by the defendant herein and the plaintiff's application for summary judgment are not merited and I consequently dismiss them with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 14th day of May 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr Attika for plaintiff

Mr Kariuki for Shah for defendant/respondent

Court Clerk - Ali