REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 1388 OF 1997

ZULFIKAR ALI HASSANALLY AND

RUSTAM HIRA (suing as the legal representatives

of the late ABDUL KARIM HASSANALLY)

NYOTA SERVICE STATION LIMITED....……PLAINTIFFS

VERSUS

WESTCO KENYA LIMITED

MWAI KIBAKI

KIBAKI MURIITHI

DR. JOHN KABIRU…….....….....DEFENDANTS

RULING

In this application (by Notice of Motion dated 7th September 2015)**,** the 2ndDefendant seeks the main orders that the Plaintiff's suit as against him be struck out.

The application is stated to be brought under section 1A and 1B of the Civil Procedure Act, Cap 21 (the Act) and under Orders 2, rule 15(1) (a) and 51, rule(1) of the Civil Procedure Rules (the Rules).

The grounds for the application set out on the face thereof are –

(i) That the cause of action as against the 2nd Defendant as contained at paragraph 9 of the Plaint is allegedly based on a personal guarantee dated 6th June 1991 guaranteeing the indebtedness of the 1st Defendant to the Plaintiffs.

(ii) That there is no such personal guarantee or any other guarantee for that matter ever given by the 2nd Defendant to the Plaintiffs.

(iii) That it is trite law that a guarantee has to be in writing and signed by the person giving it and no such guarantee by the 2nd Defendant has been produced by the Plaintiffs in this matter.

(iv) Thatthe Plaintiffs in their documents filed on 14th June 2000 have not exhibited any such alleged guarantee.

(v) That it is therefore clear that there is no reasonable cause of action as against the 2nd Defendant and the suit herein ought to be struck out.

(vi) That the orders sought will further the overriding objective of the Civil Procedure Act and Rules by ensuring the expeditious disposal of the case as against the 2nd Defendant in a just and cost saving manner.

(vii) That it is in the interests of justice that the orders sought be granted.

In response to the application the Plaintiffs filed grounds of opposition dated 5th October 2015. These are the grounds set out–

i. That there has been inordinate and inexcusable delay in bringing this application after a period of seventeen (17) years since pleadings in this case closed.

ii. That the application is baseless and lacks merit.

iii. That the second Defendant's application is based on the ground that the Plaintiffs' claim against the second Defendant is a guarantee document which, the Second Defendant contends, does not exist. This allegation is a matter of evidence which can only be urged at the full trial of this case and not by way of an Application which does not allow the Plaintiff an opportunity to even file an affidavit.

iv. That the Second Defendant has in more than one occasion previously urged the issue of lack of guarantee document unsuccessfully and this matter is now res judicata.

v. That this application is an afterthought and is clearly intended to delay this suit which has been pending in court for more than 17 years.

vi. That this application is against the overriding objectives of the Civil Procedure Act and Rules and specifically the provisions of Sections 1A and 1B of the Civil Procedure Act.

vii. The second Defendant's Application is incompetent and should not be entertained by this Court.

The application was canvassed by way of written submissions. The 2ndDefendant's submissions were filed on 17th November 2015 while the Plaintiffs' were filed on 4th December2015. I have considered the submissions, including the cases cited.

The Plaintiffs' case as pleaded in the plaint as against the 2nd Defendant is –

i. that the 2ndDefendant personally guaranteed the payment of the 1st Defendant's debt owed to the Plaintiffs with accrued interest;

ii. that the and the other Defendants agreed to pay the Plaintiffs the amounts due by instalments commencing 1st November 1991 which they have failed to honour.

They therefore sought Kshs. 10,182,496/40with interest and costs of the suit.

In the defence dated 13th August 1997 the Defendants jointly denied the Plaintiffs' claims. More particularly the 2nd, 3rd and 4th Defendants denied –

i. that they personally guaranteed the alleged payment as alleged in paragraph 9 of the plaint and if it was ever given it was invalid in law and not enforceable as it was given for no consideration;

ii. that the alleged loan having been repaid in full during the year 1990/1991, any such alleged guarantee which is not admitted was and still is superfluous;

In the case of **DT Dobie & Company (Kenya) Ltd –vs– Muchina [1982] KLR 1** it was held as follows,*inter alia,* by the *Court of Appeal* –

i. **The words "reasonable cause of action" in Order VI, rule 13 (1) mean an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as tend to support the claim prayer.**

ii. **The words "cause of action" mean an act on the part of the defendant which gives the plaint his cause of complaint.**

iii. **As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence it should be used sparingly and cautiously.**

iv. **...**

v. **...**

vi. **...**

vii.**...**

viii. **(*Obiter* Madan, JA) The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing (of) the case.**

ix. **(*Obiter* Madam, JA) The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."**

Additionally, the Court should not permit an action to be tried by way of affidavits and submissions under the guise of an application to strike out pleadings.

An application to strike out a pleading upon the ground that it discloses no reasonable cause of action or defence does not permit evidence beyond the pleading itself. See **Order 2, Rule 15(2)** of the **Rules**.

The plaintiff's plead breach of contract as against the 2nd Defendant who guaranteed to pay the Plaintiff's loan advanced in case the 1st Defendant failed to pay. The Plaintiffs have failed to provide facts and or evidence that support their cause of action against the 2nd Defendant.However, looking at the plaint without more, it cannot be said that it raises no reasonable cause of action. Whether or not that cause of action will succeed in light of the defence put forward by the Defendants is a different matter best left to trial of the action.

The Plaintiffs have not filed a replying affidavit to verify the grounds of opposition. The consequence of this failure to file replying affidavit in response to the present application is that all issues of fact that were raised by the 2nd Defendant are not controverted. For example the issue raised by the 2nd Defendant to the effect that there was no valid guarantee signed by him as in any case it has not even been exhibited in the Plaintiffs' documents.

This court shall therefore take those assertions to be true. The failure to file a replying affidavit in

contention of a fact amounts to an admission of facts. This was the holding in the case of **Kennedy Otieno Odiyo & 12 others v. Kenya Electricity Generating Company Limited (2010) eKLR**-

> **"In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant. "**

Although the Civil Procedure Act has granted this court unlimited inherent powers which should be used to allow a hearing of the substantive claim on merit, the court is nevertheless not bound to sustain a limping pleading, in this case the plaint, up to hearing stage otherwise Order 2 rule 15 would not have been made.

In view of the foregoing, the Notice of Motion dated 7th September 2015 is hereby allowed. The suit as against the 2nd Defendant is hereby struck out as it does not exhibit any reasonable cause of action as against him. The second defendant shall have the costs occasioned by this application

Orders accordingly.

Dated and delivered at Nairobi this 9th Day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE