

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 681 OF 2012

ECOBANK KENYA LIMITED PLAINTIFF

VERSUS

SEVEN FOURTEEN LIMITED 1ST DEFENDANT

JOSHUA MBITHI MWALYO 2ND DEFENDANT

MARGARET WANGUI MBITHI 3RD DEFENDANT

RULING

1. The Application for determination by this Court is a Notice of Motion dated 28 December 2012 seeking Summary Judgement as against the Defendants herein. The Grounds in support of the Application detailed that the Plaintiff's claim is for a liquidated sum founded on a Letter of Credit afforded to the first Defendant and guaranteed by the second and third Defendants. The Application is supported by the Affidavit of one **Noah Nyachae** sworn on the same date as the Application. The deponent details that he is the Manager in Charge of the Nairobi branches of the Plaintiff bank. He related that on or about 4 October 2010, the first Defendant was granted a Letter of Credit facility by the Plaintiff in the amount of Euros 124,765.00 for a beneficiary known as Ziegra Eismaschinen. The performance of the said facility with the Plaintiff bank was guaranteed by the second and third Defendants who were the directors of the first Defendant at the material time.
2. According to the deponent of the said Affidavit in support of the Application, after the Defendants had been issued with the demand letter in relation to these proceedings, they offered to pay an admitted amount of Shs. 9,259,814/- as against the demanded sum of Shs. 14,260,896/-, by way of instalments. Such a proposal was not acceptable to the Plaintiff bank who made a counter proposal which was not accepted by the Defendants. Mr. Nyachae maintained that as at the 31st July 2012, the first Defendant as Principal and the second and third Defendant's as Guarantors were truly indebted to the Plaintiff bank in the sum of Shs. 14,260,896/-. He noted that the Defendants had paid no monies to the Plaintiff at all.
3. In his submissions before court on 20 June 2013, Mr. Luseno, learned counsel for the Plaintiff, noted that the Application had been served. He also noted that there were admissions as to the amounts owed at page 38 of the Bundle of correspondence put before court by the Plaintiff. At page 19 of that Bundle, the Court would note the guarantees given to the Plaintiff bank by the second and third Defendants. He further noted that the Defendants had filed no Defence but that Wagunda & Company, Advocates had entered appearance for the Defendants on 30 November 2012.
4. I have perused the Application before Court as well as the Plaintiff herein and the List of Documents filed by the Plaintiff on 26th October 2012. It appears from the latter that the first Defendant operated 2 accounts with the Plaintiff bank the first being Account No. CA-01-10200039 and the second being Account No. 0010025007867802. From the statements at pages 46 to 55 of the Plaintiff's Bundle of documents it appears that the first account as at 31 October 2010 had a debit balance thereon of Shs. 715.79 while the second account as at 31 July 2012 had a debit balance of

Shs. 16,316,611.63, which raises the question – why is the Plaintiff’s claim for Shs.14,260,896/-. The Plaintiff also exhibited a copy of a cheque drawn in favour of the Plaintiff’s advocates dated 30 May 2012 in the amount of Shs. 500,000/-. However, according to a letter from the Plaintiff’s advocates to the directors of the First Defendant dated 6 June 2012, that cheque was returned unpaid by the first Defendant’s (presumably new) bankers – Consolidated Bank, Harambee Avenue Branch, Nairobi.

5. The above documentation comprises the plus points for the Plaintiff. What has disturbed this Court is that the Business Application for Credit Facility form exhibited as document page 1 is not in the name of the first Defendant but a business known as “Refrigeration & Air Conditioning Contractors”. There is no explanation as to the relationship between that business and the first Defendant. At page 13 of the Plaintiff’s Bundle of documents there is what purports to be a Board Resolution dated 8 December 2010 being a request for an advance payment guarantee to be given to “COMMUNITY DEVELOPMENT TRUST FUND”. There is actually no explanation to what that Resolution relates. The next letter at page 14 is on the letterhead paper of Bunyala Fishermen Co-op Society Ltd dated 9 March 2010 re a tender made by the first Defendant for the provision of supply, delivery, installation and commissioning of two Ice Flake Making machines. Again, there is absolutely no explanation as to how this communication has anything to do with the Letter of Credit which was provided for the German company – Ziegra Eismaschinen GMBH. The document at pages 15 – 19 of the Plaintiff’s Bundle of documents is the Application and Agreement for an Unconfirmed Irrevocable Letter of Credit and indeed, it is from the first Defendant in favour of the German company as above. It is signed at page 18 presumably with two authorised signatories of the first Defendant Company but that is not detailed on the face of the document. At page 19 of the same, two signatories appear again in the first instance as “Openers” and the second instance as “Guarantors”. Nowhere does it detail the names of the two signatories and the document is not witnessed nor indeed stamped, contrary to the provisions of the Stamp Duty Act.
6. In my opinion, I do not consider that it is necessary for this Court to go into any further detail with regard to the Plaintiff’s claim as against the Defendants. It is enough for this Court to say, at this stage, that it is reluctant to grant the Plaintiff’s Application for Summary Judgement dated 28 December 2012. As a result of the confusion put into the Court’s mind going to the documentation placed by the Plaintiff before the Court, I refuse the said Application and direct that the Plaintiff will set down this matter for Formal Proof before Court. In that regard, the Plaintiff will ensure that service of the hearing notice for the Formal Proof will be made upon the Defendants. Order accordingly. No Order as to costs.

DATED and delivered at Nairobi this 1st day of July, 2013.

J. B. HAVELOCK

JUDGE