REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 408 OF 2007

PRIMROSE PROPERTIES LTD…..……...……PLAINTIFF

- VERSUS-

LESLIE MUTURI .....1ST DEFENDANT

GIDEON MAINA……..……...2ND DEFENDANT

FITNESS ICON LTD…….3RD DEFENDANT

RULING

By notice of motion dated 28th July 2008, the plaintiff moved this court under the provisions of **Order XXXV Rule 1** of the **Civil Procedure Rules** seeking the entry of summary judgment against the 1st and 2nd defendants for the sum of Kshs.3,826,504 /= together with interest and costs. The grounds in support of the motion are on the face of the application. The application is supported by the annexed affidavit of Bhavna J. Upadhyay, the manager of the plaintiff. The application is opposed. Leslie Muturi and Gideon Maina, the 1st and 2nd defendants respectively, swore replying affidavits in opposition to the application.

At the hearing of the application, I heard the rival submissions made by Mr. Orowe for the plaintiff and Mr. Kaguru for the defendants. Mr. Orowe submitted that the subject amount of the suit relate to a tenancy agreement that was entered between the plaintiff and the 1st and 2nd defendants. The letter of offer and the initial agreement was executed by the 1st and 2nd defendants but subsequently thereafter a lease agreement was executed between the plaintiff and the 3rd defendant, a limited liability company incorporated by the 1st and 2nd defendants. This was after the commencement of the lease. He submitted that there was no dispute that the sum claimed in the plaint is owed to the plaintiff. The dispute is who between the 1st and 2nd defendants on the one hand, and the 3rd defendant on the other, is liable to pay the said outstanding amount. He submitted that although a lease agreement was executed between the plaintiff and the 3rd defendant in respect of the leased premises, the 1st and 2nd defendants are the persons who actually negotiated for the lease and subsequently thereafter took occupation of the leased premises. Mr. Orowe explained that the fact that the 1st and 2nd defendants incorporated the 3rd defendant after the commencement of the lease, should not take away their liability to settle the rent in respect of the demised

premises. He urged the court to find the 1st and 2nd defendants liable to settle the amount in the plaint and therefore enter summary judgment accordingly against them.

Mr. Kaguru for the defendants opposed the application. He submitted that the debt was owed by the 3rd defendant and therefore the 1st and 2nd defendants cannot in the circumstances be held liable. He reiterated that the lease agreement was entered between the plaintiff and the 3rd defendant and in the premises, the 1st and 2nd defendants, as directors of the 3rd defendant cannot be held liable. He submitted that no case had been placed before the court for the lifting of the veil of incorporation. He explained that the 1st and 2nd defendants had not executed any guarantee to enable the plaintiff hold them liable for the debts of the 3rd defendant. The fact that the 1st and 2nd defendants had executed the initial agreement should not be used as a basis of holding the said defendants liable where clearly there exists a lease agreement that was executed between the plaintiff and the 3rd defendant. He submitted that the 3rd defendant was not a shell but an existing company. He urged the court to dismiss the plaintiff's application with costs.

I have carefully considered the rival arguments made by counsel for the parties in this application. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to entitle this court enter summary judgment as prayed in its application. The principles to be considered by this court in determining whether or not to grant an application for summary judgment are well settled. In **Gohil –vs – Wamai [1983] KLR 489, Chesoni JA held at page 496** as follows:

"*The basis of an application for summary judgment under **Order XXXV** is that the defendant has no defence to the claim **(Zola and Another –vs- Ralli Brothers Ltd and Another [1969] EA 691)**. **Rule 2 (1)** of **Order XXXV** requires the defendant to show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit. The onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. He must go further and show that the defence is genuine or arguable or raises triable issues. He must show that he has a reasonable ground of defence to the question. A mere denial of the claim will not suffice. If the defendant shows that the application is not one, that should have been brought under **Order XXXV** then the court must dismiss the application. On the other hand, if the defendant establishes what he is required to do under **Rule 2 (1)** of **Order XXXV** the court should grant him conditional or unconditional leave to defend the suit and in that case the application of the plaintiff is not dismissed."*

In the present application, certain facts are not in dispute. It is not disputed that the 1st and 2nd defendants applied to the plaintiff to be leased a space of approximately 3,450 squire feet at the plaintiff's premises situate at LR. No. 209/410/2,4,5 and 6, Ngong Road, Nairobi. The terms of the lease, including the rent to be paid, was agreed between the plaintiff and the 1st and 2nd defendants. The letter of offer dated 9th June 2005 written on behalf of the plaintiff by Mssrs Mohamed & Samnakay Advocates was acknowledged and accepted by the 1st and 2nd defendants. The initial deposit of Kshs.1,190,250 /= was paid by the 2nd defendant. The 1st and 2nd defendants took occupation as tenants in the premises. Later, when the formal lease was prepared, the 1st and 2nd defendants requested the plaintiff to reflect the tenant in the lease as Fitness Icon Ltd (the 3rd defendant),.

a company incorporated by the 1st and 2nd defendant for the purposes of conducting business in the said premises. The said lease was not registered. It was executed by the 1st and 2nd defendants as directors of 3rd defendant.

There is no dispute that the business that the defendants conducted in the said premises fell in hard times. The defendants were unable to pay the rent that was demanded by the plaintiff. After a while, the defendants fell in hopeless arrears in paying the rent to an extent that the plaintiff distressed for the rent by attaching and selling the defendants' property in the leased premises. The distressed goods were sold but the plaintiff was unable to recover the entire rent amount that was in arrears hence this suit. When the

defendants were served with summons to enter appearance, the 1st and 2nd defendants filed a join defence. The 3rd defendant filed a separate defence. The 1st and 2nd defendants averred in paragraph 2 of their defence as follows:

"*The defendants deny the plaintiff's allegations as set out in paragraph 4 of its plaint, thereby putting the plaintiff to strict proof thereof, and on the contrary and without prejudice to the foregoing state that; if they ever executed any letter of offer which they still deny, then they can only have done so, not in their personal capacity, but in their capacity as officers of the 3rd defendant limited liability company herein and as such, and in congruity with the foregoing, the only circumstance in which the defendants would be held liable, under any agreement between the 3rd defendant limited liability company and 3rd parties such as the plaintiff, would be where they, 1st and 2nd defendants, give personal guarantee as directors of the 3rd defendant limited liability company and it is the 1st and 2nd defendant's assertion that no such guarantees were issued by them."*

In paragraph 3 of its defence, the 3rd defendant states as follows:

"*In response to paragraph 7 of the plaint, the 3rd defendant states that although it is true that it was incorporated by among other persons, the 1st and 2nd defendants, at no time did it, the 3rd defendant, take over any obligations and or liabilities, if any, owing from the 1st and 2nd defendants, to any third parties including the plaintiff, as alleged by the plaintiff, and as such it cannot be said to have been obligated to ensure the fulfillment of the contractual and commercial aspects of the tenancy as alleged, by the plaintiff, to have been subsisting as between the 1st and 2nd defendants on the one part and the plaintiff on the other, or any other tenancy whatsoever for that matter."*

From the above averments made by the 1st and 2nd defendants on the one hand, and the 3rd defendant on the other, it is clear that the said defendants are conspiring to defeat the course of justice. The defendants adopted defences that are deliberately meant to frustrate the plaintiff from holding either of them liable. They are playing a ping-pong game in regard to who is entitled to settle the amount due to the plaintiff. When the 1st and 2nd defendants were confronted with the present application for summary judgment, they still persisted with their defence that it is the 3rd defendant which should be held liable to settle the amount due and owing to the plaintiff.

Now, if the 3rd defendant has denied liability in its defence, can the 1st and 2nd defendants escape liability by pleading that it is the 3rd defendant who should be held liable? I do not think so. From the documents exhibited in support of the plaintiff's application for summary judgment, it was evident that from the word go the plaintiff was clear in its mind that it was dealing with the 1st and 2nd defendant. I hold that the 3rd defendant was incorporated by the 1st and 2nd defendants for the convenience of their business, and not for the purposes of the lease agreement. As stated earlier in this ruling, it not in dispute that the sum of Kshs.3,826,504 /= is owed jointly by the defendants to the plaintiff. The 1st and 2nd defendants have not seriously disputed this fact.

Having held that it is the 1st and 2nd defendants who are liable to pay the said outstanding amount, it is clear that the plaintiff's application for summary judgment cannot be resisted. There is nothing in the affidavits sworn by the 1st and 2nd defendants in response to the plaintiff's application that can persuade this court to grant unconditional leave for the said defendants to defend the suit. Their defence is sham. It does not raise any triable issue to the plaintiff's claim.

I therefore enter summary judgment for the plaintiff as against the 1st and 2nd defendants for the sum of Kshs.3,826,504 /= as prayed in the application. The plaintiff shall have the costs of the suit and the costs of the application.

It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF JULY 2009

L. KIMARU

JUDGE