IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Apaloo JJA & Kwach Ag JA)

CIVIL APPEAL NO 42 OF 1985

KESHAVJI JIVRAJ SHAH.....APPELLANT

VERSUS

JUTHALAL HADHA SHAH.....RESPONDENT

JUDGMENT

July 12, 1988, **Apaloo JA** delivered the following Judgment.

The appellant appeals against the ruling of the High Court **(Aganyanya, J)** which on the 7th December 1983, refused to strike out the defence of the respondent to the plaint filed by the appellant. The learned judge thought the defence raised triable issues which merit consideration at a full trial. The appellant says, he was wrong and that the defence was, in effect a sham.

What then are the facts?

As evidence was not adduced, the real facts of the case can only be gathered from the pleadings and the other uncontested evidence placed before the court. From them, the facts appear to be these:

The parties co-operated in a business called Prabash Timbers Ltd. The appellant, who was one of the directors, seems to have lent to the company or spent for the company's purpose the sum of Shs 101,785/25. It appears the company was unable to meet the repayment of this sum to the appellant and cheques and other bills it issued to the appellant in repayment do not appear to have been honoured. Both the respondent and one A L Shah were apparently desirous of taking on this debt so that the appellant relinquished whatever claim he may have against the company for it.

So on the 15th April, 1972 they entered into a home-made agreement and made provision for the repayment of the debt to the appellant. It seems to parties did not obtain professional legal assistance in drafting the agreement but the terms of that agreement seem plain. The plaint was founded on that agreement. It was not suggested either in the statement of defence or anything said in argument by counsel, that the contract made by the parties was other than a free and voluntary one entered into by businessmen who contracted with each other at arm's length. The submissions made to us, were predicated on the fact that that agreement was binding on the contracting parties. So, the only real question is its true meaning.

Clause one of that agreement provides that one A L Shah shall pay to the respondent the sum of Shs 101,785.25 on or before the 15th day of April 1977; that clause also acknowledged that the sum was lent and advanced to A L Shah and J H Shah (ie the respondent) jointly. Then comes clause 2 – the vital part

of the agreement. Its *ipsissima verba* is as follows:-

> "that if A L Shah fail to pay the aforesaid sum to K J Shah (the appellant) on or before the 15th day of April 1977, then J H Shah (ie the respondent) shall pay the sum of Shs 40,000/- to K J Shah on demand being made by K J Shah and the balance of Shs 61,785.25 shall be paid by A L Shah after 15th April 1977".

As this agreement was made on the 15th April 1972 and payment was not due until 15th April 1977, it is clear that the contract provided a moratorium of 5 years. So this is a clear case of a "*debitum in praesenti*" which was "*solvendum in futuro*". This fact is worth noting because it was one of the respondent's contentions that the debt was statute barred. A L Shah did not pay the agreed debt on or before the 15th April 1977. So on the 31st October 1979, the appellant, acting by his advocate, made a demand on the respondent for the payment of the Shs 40,000/- in accordance with clause 2 of the agreement.

The respondent failed to make payment and when sued, lodged a statement of which purports to be a legal answer to her liability on the contract. Immaterial averments aside, the respondent made three legal or what purports to be three legal defences namely, first, denial of liability to pay, second, the claim was statute barred, third, denial that the agreement was a guarantee or if it was, there was no consideration for it.

On the sight of the defence, the appellant, by counsel moved the court by chamber summons under Order 6 rule 13 for an order striking out the defence and for judgment on the plaint on the ground that the "written statement of defence does not disclose any or any reasonable answer to the claim of the plaintiff".

On the 29th November 1983, rival arguments were addressed to the High Court (Aganyanya J) on the legal propriety or otherwise of striking out the defence and entering judgment for the appellant on the sum claimed. On the 7th December, 1983, the learned judge delivered a reserved ruling in which he declined to make the order sought on the summons, because as the judge put it, "considering the plaint, the agreement and the application together, there are a number of legal lines which can only be decided in fully hearing the suit".

The appellant invites us to say that he was wrong and that we should put him right by striking out the defence. What "legal lines", to use the judge's phraseology, were disclosed in the pleading? As I said, they were three, first, denial that the respondent was liable under the agreement. No reason has been advanced carrying the slightest conviction in my mind why this bare denial without more can be anything approaching a legal defence on the plain terms of this contract. The less said about this ground the better.

The next "legal line" is that the debt was statute barred. Clearly, on the ordinary reading of the agreement, the respondent did not incur any liability to pay the Kshs 40,000/- until (a) after April, 15th 1977 and (b) only after demand was made on her for payment. On the undisputed facts, a demand for payment of this sum was not made on the respondent until the 31st October 1979. So, the appellant's cause of action against her cannot have accrued before that date. The plaint was brought on the 26th October 1983, well within the six year limitation period.

But counsel for the respondent contended that the cause of action accrued on the date of the agreement. Could the appellant have brought a successful action against AL Shah before April 15th 1977 or against the respondent before 31st October 1979? It is plain to me he could not, for the very sufficient reason that no breach of any provision of the agreement had taken place by those dates. On the facts of this case, the plea of limitation was not all attractive and counsel cannot make it so. In my opinion, it is the type of argument that counsel presents when he is required to do something for someone who is determined not to pay his debt.

Then counsel says, the agreement is a guarantee. One must bear in mind that this agreement was drawn up by laymen. They did not use any legal language and the Court can only interpret the sense of their

agreement and not interpolate it with any technical legal concept. Clause 2 of the agreement merely said if A L Shah did not pay the Kshs 101,735,25/- which both the said A L Shah and the respondent admitted the appellant lent them by the 15th April 1977, then the respondent will pay Kshs 40,000/ - of that sum if a demand for payment was made on her. Such demand was admittedly made when A L Shah made default. On the plain reading of that agreement, she incurred an obligation to pay.

It is not a case in which the whole debt was incurred by A L Shah alone and the respondent undertook to pay if AL Shah made default. As the money was lent to them jointly, in ordinary circumstances, both would have been jointly liable to pay the whole of it. But the agreement made a sort of concession to the respondent because her obligation to pay arises only if A L Shah, the joint debtor did not pay it by a named date. In that event, the respondent incurred an obligation, upon demand, to pay part of it, that is Kshs 40,000/-.

But even if, the agreement, properly construed, is a guarantee, does that provide the respondent with any legal defence? She agreed in writing to answer for the debt of another. That person made default. Surely, she can be called upon, by a suit to implement her guarantee by paying the debt. The argument that there was no consideration for the contract, needs to be stated only to be rejected. There are two matters stated in the agreement which, as I understand the law, constitute "consideration" first, both A L Shah and the respondent undertook to pay the debt in consideration of (1) the appellant not making any further demands on Prabash Timbers Ltd and (2) returning all bills and unpaid cheques issued by the company to the appellant. In my opinion, the contention that there is no consideration does not hold water.

One must now look carefully at the reasons given by the learned trial judge for holding that a valid defence was disclosed which should be allowed to be ventilated at the trial. The judge gave three reasons and I quote them from the ruling as follows:-

> **1. "There is a question which needs to be carefully considered by court on adduction of evidence at the trial as to the cause of action arose, if at all, the money was advanced to the third party and the defendant jointly"**
>
> **2. "There is also a question to be settled as to liability when one considers that a company Prakash Timbers Ltd was involved in the transaction as well".**
>
> **3. "There is also an issue of the interpretation of the agreement dated 15th April 1972 which will have to be decided by the court during the full trial of the case".**

I must consider these reasons *seriatim*. The first reason is somewhat obscurely expressed and is not easy to follow. I understand it to mean that the court will have to consider carefully when evidence is led, whether a cause of action was disclosed against the defendant inasmuch as the money was advanced jointly to the respondent and a third party. If I get the meaning aright, I must say, with profound respect, that that reason cannot be valid. No evidence is required to decide whether taking the written contract and the pleadings, a cause of action is disclosed against the respondent. Such a cause of action is very plainly shown. The fact that the loan was expressed to be made jointly to the respondent and the third party, does not affect the position.

I understand the second reason which is also not too clear, to mean that as a third party, namely, Prabash Timber Ltd was involved in the transaction, it raises a serious question to be tried. Again if I got the learned judge aright, I cannot accept it as a valid reason for declining to strike out the defence on the three grounds shown. Prakash Ltd is not a party to the agreement. It incurs no rights or liabilities under it. It seems to have been mentioned because the debt was originally incurred by it or for its purposes. The fact that it was named, is no obstacle to interpreting the agreement which the parties have signed. The only question to be tried, is what does the agreement mean.

The third reason is clearly expressed and is the easiest to answer. It is correct that the difference between the parties is resolvable on a true and proper interpretation of the agreement entered into by them. On the facts which were pleaded, whether or not a valid defence is disclosed, depends on the interpretation of the

agreement. No evidence is required for this. The agreement is accepted by both sides as mutually binding. It does not disclose any ambiguity whether patent or latent. So, there is no reason to defer its interpretation to a full dress trial.

Had the learned judge considered the issue before him as involving only a simple one of interpretation of the contract on the background of the undisputed facts, it is difficult to see how he can hold otherwise than that the defence filed was a sham.

Counsel for the appellant invited us to say, to quote the words used in the chamber summons, that:

> "the written statement of defence does not disclose any or any reasonable answer to the claim of the plaintiff".

To that invitation, I readily respond. Indeed, it wholly accords with my own view of the matter. That defence was very clearly a sham and was obviously designed to postpone, so to speak, the day of reckoning.

Accordingly, I would allow the appeal and set aside the ruling appealed from. In lieu of it, I would strike out the defence and enter judgment for the appellant in the sum claimed in the plaint with interest and costs here and below.

Gachuhi JA. The facts of this case are stated in the judgment of My Lord Apaloo JA that I need not repeat them in detail unless where necessary.

The main issue here is whether, the trial judge in declining to strike out the defence on the basis that there were triable issues, there were in fact triable issues on whether the defence was a sham. The vital facts for consideration are:

1. What was the relationship of the parties?

2. What motivated the agreement they entered into?

3. Are there legal implications in the agreement that required legal interpretation?

4. Are there legal issues to be determined by the full hearing.

The arguments advanced for the appellant are simple and clear. The parties were directors of an enterprise known as Prakash Timbers Ltd. The sum of Shs 101,785/25 was used for and on behalf of that company. The company issued bills and cheques payable to the plaintiff which bills and cheques were never met. Then the parties considered how they would treat this amount which was payable to one of the directors. Without seeking legal advice, they decided to write their agreement on 15th April 1972 that the respondent and the other director Amritlal Lakhamshi Shah will treat this amount as a loan advanced to them by the appellant. The terms of the repayment were that there will be a moratorium of 5 years.

That is Amritlal Lakhamshi Shah will repay the said loan on or before 15th April 1977, but if he fails to pay on that date, then the respondent will, on demand being made by the appellant; pay Shs 40,000/- and the balance shall be paid by Amritlal Lakhamshi Shah also on demand after 15th April, 1977. In consideration of this agreement, the appellant was to return all the unpaid bills and cheques. The appellant demanded the payment through his advocate on 31st October 1979 but the respondent failed to pay. The suit was then filed. In his defence, the respondent claimed that the agreement was statute barred and also denied that the appellant lent the money and that without prejudice to other alleged denials the agreement was a guarantee which was not binding.

There is no ambiguity in the layman's language used in the agreement. It is simple and clear. All the parties understood and knew what their obligations were at the time of signing the agreement. No duress pleaded. From the language used, the agreement cannot be caught by limitation because the time for

performance was not due until 15th April 1977.

Limitation would then start to run from that date. Again the respondent would not be liable for the payment until actual demand was made which in fact was made on 31st October 1979.

The language used does not import any guarantee because the respondent was to pay a certain portion of the claim while the balance was to be paid by the other. When the language is so clear, there is no need to go behind the agreement to find out their shareholding in the company or for what reason the company spent the money or in search of any ground to repudiate the agreement. All the bills and cheques made out by the company payable to the appellant were returned to the respondent and the other director. Since each director was to pay specified amount there is no need to know whether the other director has paid his share or not as what Mr. Makhecha wanted to put in issue. The company itself should not be brought in as it was not a party to the agreement.

On my part, the agreement was binding on the parties and I do not see that there is any need to know what was at the background in making the agreement or any implication there could be or any legal point of view or issue that needed interpretation or evidence required to prove those issues at the trial. The defence was intended to delay the appellant obtaining judgment for the amount which is due to him to which in the language of the agreement, there is no defence. It is my view that the agreement did not need legal interpretation and it was not caught by limitation nor was it a guarantee. The learned Judge ought to have rejected the respondent's argument and treat the defence as a sham which ought to have been struck out and judgment entered for the plaintiff on the chamber summons for summary judgment. I would allow the appeal and set aside the order of the High Court for dismissal of the chamber summons. I would strike out the defence and enter judgment for the plaintiff as prayed in the chamber summons. I would allow the appellant the cost of this appeal and the cost of the suit and the chamber summons in the High Court.

As Apaloo JA and Kwach Ag JA also agree, it is so odered.

Kwach Ag JA. I have had the advantage of reading the judgments prepared by Gachuhi JA and Apaloo JA. I agree that the appeal should be allowed; the defence struck out and judgment be entered for the appellant as prayed together with interest and costs.

On any view, looking at the defence filed by the respondent against the agreement freely entered into by the parties, I entertain no doubt at all that the defence was intended purely to delay the appellant.

Dated and delivered at Nairobi this 12th day of July , 1988.

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

R.O KWACH

…….

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR