



REPUBLIC OF KENYA



Synergy Industrial Credit Limited v Khilna Enterprises Limited & 2 others (Civil Case 476 of 2016) [2024] KEHC 269 (KLR) (Commercial and Tax) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 476 OF 2016
AA VISRAM, J
JANUARY 25, 2024**

BETWEEN

SYNERGY INDUSTRIAL CREDIT LIMITED PLAINTIFF

AND

KHILNA ENTERPRISES LIMITED 1ST DEFENDANT

DR JAYENRA K MALDE 2ND DEFENDANT

MRS RANJAN J MALDE 3RD DEFENDANT

RULING

1. This ruling disposes the Notice of Motion application dated 29th June, 2022 (“the Application”) brought under sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 2 Rule 15 1(a), (b) (c) and (d), Order 51 rule 1 and 3 of the *Civil Procedure Rules 2010*, and all enabling provisions of the law.
2. The Application seeks to have the amended statement of defence dated 10th June, 2022, struck off, and Judgment entered for the Plaintiff as prayed for in the plaint.
3. The Application is premised on the grounds on the face of it and on the further grounds set out in the supporting affidavit sworn by Jacob Mbae Meeme.
4. The Applicant avers that the suit was instituted against the Defendants for a liquidated sum of Kshs. 41,013,114.00/=, which is the money owing to it pursuant to various hire purchase agreements between itself and the 1st Defendant. It contended that the 2nd, 3rd and 4th Defendants are sued as guarantors because they executed letters of guarantee, and undertook to pay the Plaintiff on demand for liabilities incurred by the 1st Defendant.



5. The Applicant contends that that there are no triable issues raised in the statement of defence; the same is frivolous; a sham; and an abuse of the court process because the 2nd, 3rd and 4th Respondents/ Defendants are truly indebted to the Plaintiff.
6. In opposition to the Application, the 2nd, 3rd and 4th Defendants filed a replying affidavit sworn by Milan J Malde on 31st October, 2022. He deposed that the defence raised triable issues, namely, that the Defendants denied the proper execution of the hire purchase agreements; and that they were not party to the said agreements.
7. In reply to the above, the Applicant filed a supplementary affidavit dated 20th February, 2023, sworn by Jacob Mbae Meeme, He deposed that the 2nd, 3rd and 4th Defendants had been sued for breach of the terms of the guarantee and undertaking executed on diverse dates. Further that the statement of defence did not raise any triable issues, only mere denials. Finally, that the Defendants had not denied the existence of the Hire Purchase Agreements numbers 2008/10/2265A, 2009/10/2314A, 2009/10/2316A and 2010/07/236 and had admitted to giving the guarantee to secure the hire purchase facility.
8. The application was canvassed by way of written submissions which I have considered. The Applicant filed its submissions dated 18th April, 2023, and the Respondent filed its submissions dated 5th May, 2023.
9. The Applicant submitted that the amended defence did not raise any triable issues. The 2nd, 3rd and 4th Defendants had not denied the existence of the contracts of hire and purchase. And they had not denied that they were the guarantors of the said contracts. Accordingly, they were obligation to pay the debts arising from the same. It relied on the decision of the High Court in *Brite Print (K) Ltd vs Attorney General* [2001] eKLR in support of the above argument.
10. It contended that the cause of action arose from the breach of guarantee and undertaking made by way of executing letters of guarantee and undertaking. Consequently, the liability of the Respondents arose upon default of the same which comprises of an independent and collateral agreement between the parties.
11. Further, the 1st Defendant had defaulted and Judgment had been entered. Accordingly, there is nothing to take to trial as far as the 2nd, 3rd and 4th Respondents as a guarantor(s) of the 1st Defendant is concerned. In support of the above argument, the Applicant relied on the decision of the High Court in *Kenindia Assurance Company Limited vs First National Finance Bank Limited* [2008] eKLR.
12. The Applicant further relied on the decision of the High Court in *Gulf African Bank Limited vs African Water Drilling Company Limited & 3 others* [2021] eKLR, where the court stated that because the Defendant statement of defence had not contested the existence of the guarantee, the Defendant had not raised any triable issues or reasonable cause of action.
13. The Respondents, on their part submitted that the further statement of defence raised triable issues with regard to privity of contract; enforcement of the contract; and relating to the procedure for recovery of the liquidated sum.
14. They submitted that the Defendants' defence disclosed that the Defendants did not owe the Plaintiff the liquidated outstanding sum.
15. They contended that the Plaintiff could not enforce a contract that it was not privy to, and further, that the Defendants did not owe any payment of the outstanding sum.



Analysis and Determination:

16. I have considered the grounds set out on the face of the Application together with the further grounds set out in the supporting and supplementary affidavit of the Applicant. I have also considered the opposition to the same as contained in the replying affidavit of the Respondents and the rival submissions of the parties, as briefly summarized above.
17. The primary issue that arises for my determination is whether or not the Plaintiff has made out a case for striking out the further amended statement of defence dated 10th June, 2022.
18. Order 2 Rule 15 of the *Civil Procedure Rules* which deals with striking out of pleadings provides as follows;

“Rule 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

 - (a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or vexatious; or
 - (c) It may prejudice, embarrass or delay the fair trial of the action; or
 - (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
19. In *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:-

“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 and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
20. Further in the *Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) the Court of Appeal stated:-

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the Respondent’s action or which is otherwise an abuse of the process of the court.”
21. Guided by the above law, and applying the facts of the present matter to the same, I am persuaded that the test upon which the court ought to strike out has been met.
22. I have looked at the hire purchase agreements referenced as 2008/10/2265A; 209/10/2314A; 209/10/2316A; and 2010/072366 and is clear to me that the 2nd, 3rd, and 4th Respondents are guarantors of the 1st Defendant in respect of the said contracts for hire purchase. The same is duly acknowledged at Clauses 1 and 2 of the said agreements.



23. Further, the arguments raised by the Respondents do not strike me as triable issues which require a full-length trial, including, calling of, and cross examination of witnesses. Such a process would, to my mind, be a waste of judicial time and resources because the instant issues may be resolved by simply looking at the relevant agreements.
24. Looking at the various agreements, the Respondents have signed each and every page of the letter of guarantee and undertaking, and the same document bears the name of the Plaintiff and its logo on each page. It is clear to me that the said documents were intended to be, and are, in fact, contractual agreement(s) between the Applicant and all the Respondents.
25. Moreover, the letters of guarantee and undertaking are issued by Respondents to the Applicant, and the same have been executed by each and every one of them. In light of the above, I am not persuaded that the challenge based on ‘improper execution’ is founded on any basis. The agreements bear the signatures of the Respondents, and none of them have denied this fact or have challenged the authenticity of the same by way of deposition.
26. Finally, it is not disputed that the Respondents accepted and benefitted from the credit facilities offered by the Applicant pursuant to, and conditional to signing the said letters of guarantee and undertaking. In view of the above, I find that the Respondents challenge to the contract based on both non privity and improper execution fails. The decision of the High Court in *Brite Print (K) Ltd vs Attorney General* [2001] eKLR provides a case in point, and the contract is affirmed.
27. Having found that the contract is valid, looking at the various agreements, I find that Clause 1, “Guarantor to pay on demand”, Clause 2, “Existing Liability”, Clause 5, “Notice to Determine Guarantee”; and Clause 6 “Payment” are all consistent the Applicant’s case. Simply put, based on the present facts, there is nothing to take to trial as the amended defence does not set out any grounds why they are not liable under it. The defence consists of no more than bare denials, which are not a sufficient defence (see *Magunga General Stores v Pepco Distributors Ltd* [1987] KLR 150). I therefore find that no purpose will be served by proceeding to trial.
28. Finally, I am in agreement with the Applicant, that the Guarantee and Indemnity is an independent and collateral agreement between the Plaintiff and the 2nd, 3rd, and 4th Respondents /Defendant as a guarantor (see *Gideon Letoya ole Hapu and Another v Estate Finance Company of Kenya Limited* Nrb CA Civil Appeal No. 259 of 2011 [2019] eKLR). In *Kenindia Assurance Company Ltd v First National Finance Bank Ltd* Nrb CA Civil Appeal No. 328 of 2002 [2008] eKLR, the Court of Appeal discussed the nature of a guarantee wherein it held that:-
- “It is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security of guaranteeing payment by a third party. In such cases, the most important factor to consider before liability can attach is whether there has been default. Once default is established and there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security.”
29. The facts in the present matter are that the 1st Defendant defaulted; and Judgment was entered against it. The Plaintiff has not discharged the guarantors of their contractual obligation; and nor have the Respondents made out a case that would discharge them of their obligations to the Plaintiff. The Respondents are therefore obligated to perform the contract and are liable for default by the principal debtor to the extent of the guarantee.
30. Accordingly, based on the reasons set out above, I find and hold that the 2nd, 3rd and 4th Respondents/ Defendants’ amended defence does not raise any bona fide triable issues and is accordingly struck out.



31. The application is allowed on the following terms:-

1. The further amended statement of defence dated 10th June, 2022, is hereby struck out and Judgment is entered in favour of the Plaintiff as per the plaint dated 23rd March, 2022.
2. The Respondents shall bear costs of the application and costs of the suit.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF JANUARY 2024

ALEEM VISRAM, FCIArb

JUDGE

