



Mini Holdings Limited & another v Astonfield Management Limited & 3 others (Civil Suit E213 of 2022) [2024] KEHC 3056 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E213 OF 2022
FG MUGAMBI, J
MARCH 15, 2024**

BETWEEN

MINI HOLDINGS LIMITED 1ST PLAINTIFF

AMIN AKBERALI MANJI 2ND PLAINTIFF

AND

ASTONFIELD MANAGEMENT LIMITED 1ST DEFENDANT

ASTONFIELD RENEWABLE RESOURCES LTD 2ND DEFENDANT

ASTONFIELD SOLAR (AJMER) PRIVATE LTD 3RD DEFENDANT

AMEET SHAH 4TH DEFENDANT

RULING

Background

1. This ruling determines the application dated 7th October 2022 which seeks to have the pleadings in this suit struck out and the suit dismissed. The application is brought under sections 1A, 13 and 3A of the *Civil Procedure Act* and Order 2 rule 15 (1) (b) and (d) of the *Civil Procedure Rules* 2010. It is premised on the grounds that this Honourable Court lacks jurisdiction as the cause of action arose in India. Further, the applicant contends that there is no privity of contract between the plaintiffs and the defendants in respect of the plaintiffs' alleged claim.
2. The applicant denies that there was any privity of contract between the plaintiffs and the defendants in the lending agreement subject of this claim. In particular, the applicant avers that the defendants were not privity to the endorsement of the 1st plaintiff by Harwood Limited for funding of the non-binding term sheet dated 20th July 2010. The applicant states that this was an agreement between Harwood



- Limited and the 1st defendant not with the plaintiffs. In consideration for the funding agreement Harwood applied for and was issued shares by the 1st defendant.
3. The applicant further points out that the defendants are not privy to the unconditional and irrevocable Stand by Letter of Credit (SBLC) between Diamond Trust Bank (DTB) Kenya and Development Credit Bank Limited, (DCB) Mumbai, who are in any case, not parties to this suit. Further, the applicant argues that the defendants are not privy to the loan facility of May 2015 between DTB and the plaintiffs. The applicant contends that he neither has the authority to commit the defendants neither did he guarantee the loans with DTB, which were all signed in India, outside of this Honourable Court's jurisdiction.
 4. According to the plaintiff, the dispute herein originates from an alleged lending transaction between the 1st plaintiff and the 1st defendant, following negotiations between their associated companies, that is the 2nd and 3rd defendants. The said agreement was witnessed by the 2nd plaintiff and the applicant and as a director of the 3rd defendant the applicant had capacity to bind the 3rd defendant.
 5. The plaintiffs claim is that arising from the said agreement to facilitate the 1st defendant to obtain a facility, the plaintiff's requested the 1st plaintiff's bank, Diamond Trust Bank Kenya (DTB), to issue a Stand by Letter of Credit (SBLC) for the sum of USD1,200,000.00 in favour of Development Credit Bank Limited, Mumbai, (DCB), in consideration of which DCB would offer facilities to the 1st defendant and its subsidiaries for its solar projects in India.
 6. This was done and on 9th March 2015 DCB called in the guarantee under the SBLC. DTB honored the demand for payment by debiting the plaintiff's account to pay the amount of USD 1,166,000 to DCB. In order to make good this obligation, the plaintiffs took a loan with DTB, which remains outstanding.
 7. In the replying affidavit sworn on 28th November 2022 by Shriram Phadke, an accountant with the 1st plaintiff, it is also the plaintiffs' case that the issues raised in the application are issues that ought to be argued by the parties at a full trial. The plaintiffs further insist that the 1st defendant wrote to the plaintiffs through the applicant who is the 1st defendant's director and therefore authorized signatory, a number of times, acknowledging their indebtedness to the 1st plaintiff.
 8. It is the plaintiff's case that the question of privity of contract is one which should be left for the trial. In any case, the plaintiffs argue that there is sufficient material on record to prove that indeed there was privity of contract between the plaintiff's and the defendants.

Analysis

9. The Court has carefully considered the pleadings, submissions, authorities and evidence presented by rival parties. The first issue for this Court is to make a finding on whether or not it is clothed with jurisdiction to proceed entertaining this dispute.
10. The applicant referred this Court to a number of decisions including the locus classicus case of *Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd*, [1989] eKLR as well as the Supreme Court's decision in the case of *Samuel E Kamau Macharia V KCB & 2 Others*, Civil Application No. 2 of 2011.
11. These decisions collectively underscore the fact that a Court's jurisdiction flows from either the Constitution or legislation or both and therefore, the Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Not even by the consent of parties. A Court acting without jurisdiction is acting in vain.



12. I have looked at the plaint filed in this suit. Quite apart from the contract between Harwood and the 1st defendant is a second auxiliary contract allegedly entered into between the plaintiffs (through the 2nd plaintiff) and the defendants (through the 1st defendant) where the plaintiffs facilitated the issuance of an unconditional and irrevocable SBLC through their bankers (DTB-Kenya), dated 8th August 2013. This is the basis of the plaintiffs claim. The SBLC valued at USD 1,200,000 was in favour of the defendants' bankers, DCB – India in consideration of DCB extending credit facilities to the 1st defendant to finance solar projects that were being undertaken by the 1st defendant and its subsidiaries in India.
13. On 9th March 2015 DCB called in the guarantee under the SBLC. DTB honoured the demand for payment by debiting the plaintiff's account to pay the amount of USD 1,166,000 to DCB. These funds were secured by the plaintiffs through a loan with DTB, which remains outstanding. This as I understand is the basis of the plaintiffs claim from the defendants, based on the Financing Agreement between the plaintiffs and the 1st defendant.
14. In this regard, it is my view that the contract was performed partly in Kenya where the SBLC was initiated for the benefit of the 1st defendant and its subsidiaries in India. I do however note that section 15 provides as an alternative, that a suit arising from a contractual relationship can be filed where a defendant resides. The rationale for this is informed by considerations including convenience and reduced expenses for the defendant to defend a lawsuit in their place of residence, easier access to legal representation and certainly the ease of enforcing a judgment in the defendant's locality.
15. Given this option, the plaintiff relies on section 15(b) of the *Civil Procedure Act* which requires that:
- “Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—
- (b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution ...”
16. It is admitted that the 1st defendant is a parent company of the 2nd and 3rd defendant companies. It has not been disputed that the 3rd defendant is a corporate entity with business in Kenya. It is also not disputed that the 4th defendant is a director of the 1st and 3rd defendant and that he resides and carries out business in Kenya. It is therefore my finding that these reasons are sufficient to clothe this Court with the jurisdiction to entertain this matter.
17. On the second issue relating to privity of contract, the plaint filed by the plaintiffs is very clear that their claim against the defendants arises as a result of the SBLC having been revoked. This meant that the plaintiffs now owed DTB the amount of USD1,067,026. In order to fulfil its obligation to discharge its indebtedness, in May 2015 the plaintiffs applied for a loan facility from DTB of Kshs 109, 671,953.84. The same is yet to be paid off. The plaintiff sues the defendants as beneficiaries of the facility which the 1st defendant requested the plaintiffs to facilitate.
18. In *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another*, [1980] eKLR, Madan JA, stated as follows:
- “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.”

19. The circumspection with which a Court must act in striking out a pleading was also emphasized in *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa*, (Civil Appeal No. 54 of 1999). The Court of Appeal stated as follows:

“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.”

20. In my view, the issue of privity of contract cannot be determined at this interlocutory stage. It is a question that will require to be subjected to evidence for parties to prove or disprove each other’s allegation.

Determination

21. The long and short of this is that the application dated 7th October 2022 is devoid of merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 15TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

