IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: W. KARANJA, ASIKE-MAKHANDIA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 33 OF 2017

BETWEEN

EAST AFRICAN DEVELOPMENT BANK LIMITED.....APPELLANT

AND

MUJTABA JAFFER.....1ST RESPONDENT

MANOJ SHAH.....2ND RESPONDENT

AMRITLAL DEVANI.....3RD RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Mombasa (P.J. Otieno, J.) delivered on 20th December, 2016

in

HCC Case No. 153 of 2003)

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JUDGMENT OF THE COURT

1. This appeal arises from a ruling delivered on 20th December 2016 by which the High Court at Mombasa (***P.J. Otieno, J.***) struck out the appellant's suit against the respondents for recovery of USD 9,961,114.91 and interest. The suit was struck out on the grounds that a Guarantee Agreement executed by the respondents on which the suit was founded was void for all purposes having been prepared by an "*unqualified person*" within the meaning of Section 34 of the Advocates Act.

2. First, the background in brief. In July 2003, the appellant, East African Development Bank (the Bank) described as a development bank established by the Treaty Amending and Re-enacting the Charter of East African Development Bank 1980, filed suit against, Mujtaba Jaffer, Manoj Shah and Amritlal Devani, the 1st to 3rd respondents seeking to recover USD 3,578,413.92 and interest at 12%. It was averred in the plaint that at the request of the respondents, the appellant extended a loan by way of special drawing rights to Kenya Bus Services (Mombasa) Limited

(hereafter referred to as the principal debtor or as Kenya Bus) under a loan agreement dated 1st October 1998; that by a written guarantee of the same date, the respondents agreed to guarantee the due and punctual payment of the loan by Kenya Bus; that thereafter the loan was disbursed but Kenya Bus subsequently defaulted in the repayment of the loan and as at 1st March 2003, the said amount of 3,578,413.92 and interest at 12% per annum was outstanding, in respect of which the Bank sought to recover from the respondents under the said guarantee.

3. In their statement of defence, the respondents admitted that a loan agreement was made between the Bank and Kenya Bus but that the Bank "*had agreed to take, in addition to the personal guarantees of the* [respondents] *a first legal charge over the principal debtor's property known as Mombasa Island/Block I/315…as well as a floating debenture over the principal debtor's entire movable assets present and future*"; that the respondents agreed to enter into and execute the guarantee in favour of the Bank on the assurance and understanding that the Bank would also have as security for the repayment of the debt from Kenya Bus, a valid registered charge and valid registered debenture but that the Bank in breach of its fiduciary duty to the respondents failed to exercise due care with the result that the security was not taken and that the respondents were therefore entitled to be discharged from their obligations under the guarantee.

4. It was pleaded further in the defence, that receivers appointed by the Bank took possession of the property and all the vehicles, machinery and moveable assets of Kenya Bus but failed to take proper care of those assets with the result that massive thefts and pilferages took place thereby diminishing the value of the assets available for recovery of the Bank's debt to the detriment of the respondents. It was contended that in the circumstances the respondents were entitled to be released and discharged from the guarantee.

5. In an amended plaint dated 5th August 2010, the Bank pleaded that as security for the loan facility, Kenya Bus agreed to charge its property and assets, including its property Mombasa Block I/315 by a debenture registered on 24th November 1998; that on 10th April 2001 the Bank appointed receiver managers over the assets of Kenya Bus and that during the pendency of the suit, in 2006 the receiver managers sold the said property Mombasa Block I/315 and realized an amount of Kshs.38,000,000.00 which was credited to the loan account leaving an outstanding balance of USD 9,961,114.91 which it claimed from the respondents together with interest.

6. In their amended defence dated 23rd August 2010, the respondents averred that *"the said guarantee was executed by all of them after the execution of the loan agreement the debenture and the charge"* and consequently there was no consideration for the guarantee, alternatively the consideration was past. Of relevance to this appeal, the respondents in paragraph 15 the amended defence pleaded:

"15. Without prejudice to any of the foregoing and in further alternative the defendants will aver that the said guarantee, which according to its tenor was enforceable within Kenya and was to be governed in all respects by the laws of the Republic of Kenya and any actions to be part file thereon or connected with the enforcement thereof were to be brought in the court in Kenya and the same was totally unenforceable, invalid and void as initio (sic), as it was prepared not by any advocate holding a valid current practising licence to practice as an advocate in Kenya, instead it was prepared by the Secretariat of the plaintiff from Uganda."

7. The Bank filed a reply to amended defence dated 13th February 2013. In paragraph 11 thereof, the Bank

averred:

"11. In response to paragraph 15 of the amended defence, the plaintiff avers that the said guarantee prepared by its Secretariat was enforceable within Kenya and was to be governed in all respects by the Laws of the Republic of Kenya. The plaintiff denies that the same was totally unenforceable, invalid and void abinitio and puts the defendants to strict proof thereof. The guarantee in issue does not fall under Section 34 of the Advocates Act because it is not a document relating to conveyance of property, formation of a company, formation or dissolution of partnership, grant of probate or legal proceedings. The guarantee is therefore valid and enforceable in law."

8. About two years later, on 28th May 2015, the respondents presented an application dated 26th May 2015 that culminated in the ruling the subject of this appeal in which they applied for an order that the Bank's plaint as amended be struck out with costs on the grounds that the agreements sought to be enforced by the Bank were illegal and void in law. In his affidavit in support of that application, Manoj Shah, the 2nd respondent deposed that the security instruments were drawn by a person not known nor recognized under the Advocates Act, namely

"the Secretariat, East African Development Bank".

9. In opposition to the application, the Bank filed grounds of opposition asserting, among other things, that a guarantee is not one of the documents that have to be prepared by an advocate; that the guarantee is a contract between the Bank and the respondents conferring rights and imposing obligations between them; that the guarantee complies with all legal requirements including payment of stamp duty on it; and that this was not a clear case for striking out.

10. In addition to the grounds of opposition, a Principal Investment Officer of the Bank, Robert Muriithi, in his replying affidavit deposed that based on advice of his counsel, the loan agreement and the guarantee are not among documents prescribed under Section 34 of the Advocates Act that must be drawn or prepared by an advocate; that while the guarantee document indicates that it was prepared by the Secretariat of the Bank, it was in fact prepared by the law firm of Anjarwalla and Abdulhussein & Company Advocates. He exhibited to his affidavit copies of letters dated 4th September 1998, 1st December 1998, and 2nd December 1998 exchanged between that firm and the Bank in connection with the preparation of the security documents. He stated that the security documents including the guarantee were duly approved by the respondents at a meeting held on 8th October 1998.

11. An affidavit sworn by Rugambwa Cyril Pesha, an advocate of the High Court of Tanzania was also filed in answer to the application in which he deposed that he worked for the Bank between June 1995 and December 2005 and was involved in "*the securitization for the loan*" the Bank was advancing to Kenya Bus and that he was aware that the security documents were prepared and registered by Anjarwalla Abdulhussein & Company advocates.

12. In a supplementary affidavit in answer to those affidavits, Manoj Shah deposed that it was clear that Rugambwa Cyril Pesha was in the employment of the Bank during the period when the alleged securities were drawn and reiterated that from the body of the documents, it was clear that they were drawn by *"The Secretariat, East African Development Bank."*

13. Having considered the material presented before him, the learned Judge of the High Court delivered the impugned ruling on 20th December 2016, and as already indicated, struck out the suit. The Judge found that the guarantee agreement fell under Section 34 of the Advocates Act under which unqualified persons are prohibited from preparing. The learned Judge stated:

"25. My reading of that provision of the law and the document upon which the suit is grounded leave me with no doubt that

the guarantee agreement is a document, as it shows to be an assurance for the payment of the money advanced to Kenya Bus Services (Mombasa) Ltd, that the Kenyan law forbid an unqualified person from preparing or drawing."

14. The Judge went on to say that the law forbids an unqualified person, which Mr. Pesha is conceded to have been by the confirmation of the Law Society of Kenya, from preparing a document that he did prepare; that he was therefore not qualified to act in preparation and drawing a document which it was the preserve of an advocate in Kenya to prepare. The Judge found support in the decision of the Supreme Court of Kenya in the case of ***National Bank of Kenya Ltd vs. Anaj Warehousing Ltd [2015] eKLR*** before concluding thus:

"29. Having come to the conclusion that the guarantee agreement was a document as defined under Section 34(1) g (sic) the Advocates Act, and having found that it is void for all purposes, and the suit herein being grounded on the document so found, it follows that there is no suit that merits being sustained to be heard on the merits."

15. That is the decision that has been challenged in this appeal by the Bank through learned counsel ***Mr. Kiragu Kimani SC*** who appeared with ***Mr. Queenton Ochieng*** learned counsel on the grounds that the decision constitutes an erroneous exercise of judicial discretion; that the Judge erred in holding that the guarantee was prepared by an unqualified person when it was in fact prepared by the law firm of Anjarwalla and Abdulhussein & Company Advocates; that the Judge did not follow the principles enunciated by the Supreme Court of Kenya in ***National Bank of Kenya Ltd vs. Anaj Warehousing Ltd*** and that the Judge should have followed the principles set out by the Supreme Court of England in the case of ***Patel vs. Mirza (2014) EWCA Civ. 1047***.

16. The respondents strenuously opposed the appeal through learned counsel ***Mr. Ochieng O'doul*** who led the firm of Majanja Luseno & Company Advocates and urged us to uphold the decision of the High Court.

17. In considering the appeal, the beginning point is that the decision of the learned Judge involved exercise of judicial discretion. Accordingly, the circumstances in which this Court may interfere with such decision are limited. As stated by ***Madan, JA*** in ***United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] E.A 898***, at page 908:

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

18. Earlier, in ***D.T. Dobie & Company (Kenya) Ltd vs. Muchina [1982] KLR Madan, JA*** had cautioned that the power to strike out a pleading should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as that is the preserve of the trial judge; that the court ought to act very cautiously and carefully; that if an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to over act by considering itself in a bind to summarily dismiss the action; and that a court of justice should aim at sustaining a suit *rather than terminating it by summary dismissal, and that "normally a law suit is for pursuing it."* He went further to state that 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; that 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 the case before it.

19. With those principles in mind, we turn to consider the appellant's grievances beginning with the principal question whether the finding by the learned Judge that the guarantee was prepared by an unqualified person is well founded.

20. Mr. Kimani submitted that even assuming that there was a requirement that a guarantee is a document that required preparation by an advocate, it was not, as the Judge expressed, prepared by Mr. John Pesha. It was submitted that the guarantee as well as the other security documents were in fact prepared by the firm of Anjarwalla and Abdulhussein & Company Advocates but under the supervision of Mr. Pesha; that the learned Judge made his finding in that regard without evaluating and appreciating all the uncontroverted evidence that was placed before him, particularly the correspondence that was exhibited to the replying affidavit of both Robert Muriithi and that of Pesha.

21. Mr. Oduol, counsel for the respondents on the other hand submitted that there is no contest that the guarantee together with the other security documents were drafted by the Bank's inhouse counsel Mr. Pesha, an advocate of the High Court of Tanzania who did not qualify to do so, and not the firm of Anjarwalla and Abdulhussein & Company Advocates as claimed by the appellant; that the guarantee, as well as the other security documents indicate clearly that they were drawn by the Secretariat of East African Development Bank and the finding by the Judge in that regard is therefore correct.

22. On our part, we consider that, whether the guarantee agreement was prepared by Mr. Pesha, or by the Secretariat of the Bank or by the firm of Anjarwalla and Abdulhussein & Company Advocates is a question of fact. It is evident, and plain for anyone to see from the guarantee agreement itself, that it is indicated at page 4 thereof, "*Drawn by: The Secretariat, East African Development Bank…Kampala, Uganda.*" Indeed, the Bank in paragraph 11 of its reply to amended Defence reproduced above appears to have acknowledged as much when it pleaded, "*the Plaintiff avers that the said guarantee prepared by its secretariat was enforceable within Kenya…*". It is perhaps the reason the learned Judge appears to have proceeded on the basis that it was a foregone conclusion that the guarantee was prepared by Mr. Pesha. In that regard, the Judge expressed:

"This court as a state organ is bound to observe the rule of law which is the bastion of democracy and the well-being of every civilized society. The law forbids an unqualified person, which Mr. Pesha is conceded to have been by the confirmation of the Law Society of Kenya, from preparing the document he did prepare. He was therefore not qualified to act in preparation in drawing a document which it was the preserve of an advocate in Kenya to prepare. Now that he did so, he contravened the law and that cannot be blessed or countenanced by this court."

23. The learned Judge does not appear to have considered it necessary to interrogate the claims in the affidavits filed in opposition to the application to the effect that the documents were prepared by the said firm of advocates. Indeed, the only issue the Judge identified and addressed in his ruling, namely "*whether the guarantee is a document the law dictates must be prepared by an advocate as defined in law and if so the effect of such a document not being prepared by an advocate*" does not appear to have left room for an inquiry as to who drew the documents.

24. There was material placed before the Judge that appeared to paint a different picture but which the Judge does not appear to have considered. In a letter dated 10th August 1998, for instance under the subject heading "*Legal Documentation Term Loan SDR 1,600,000 to Kenya Bus Services (Mombasa) Ltd*", PVR Rao, Financial Consultant, Tact Consultancy Services wrote to the Secretary/Counsel of the Bank and stated that,

"Anjarwalla and Abdulhussein & Company Advocates have been authorized by my clients Kenya Bus Services (Mombasa) Ltd, to prepare and register the legal documentation relating to the above term loan approved by EADB."

25. On 4th September 1998, the said firm of advocates wrote a letter transmitted by facsimile to Mr. Pesha of the Bank under the subject reference *"Term Loan SDR 1,600,000 to Kenya Bus Services (Mombasa) Limited ("KBS")"* in which they stated as follows:

"Further *to our telephone conversation on 2nd September 1998, we look forward to receiving from you (preferably by email) a copy of a Legal Charge, Debenture, Chattels Mortgage and personal Guarantee which you have approved before a transaction in Kenya. We confirm that upon receiving the same we shall be pleased to draft the securities as you requested we do, in view of the time pressures on your side. These draft will enable us to draft documents along the lines of documents previously acceptable to you and which can hopefully be agreed more speedily.*

You can send the document directly to the writers email address…

We look forward to receiving the above-mentioned documents as soon as possible and also receiving your comments on the loan agreement sent to you on 31st August 1988 which you told us that you will be dealing with early next week.

Yours faithfully

Anjarwalla Abdulhussein & Co"

That letter was copied to Mujtaba Jaffer, the 1st respondent.

26. In his letter dated 1st December 1998, the 1st respondent as director of Kenya Bus requested the Bank to disburse the loan amount and directed the Bank how the loan proceeds would be channeled. The following day, by a letter dated 2nd December 1998, the said advocates transmitted to the Bank, original Debenture dated 13th November 1998; two counterpart dated 13th November 1998, certificate of lease in respect of the property known as Mombasa/Block 1/315 and of more relevance, "*original and one counterpart of the Guarantee Agreement dated 1st October 1998 between M. Jaffer, M. Shah, A. Devani and* [the Bank]" which were duly acknowledged as having been received by the Bank.

27. Based on the correspondence, to which the learned Judge made absolutely no reference, it seems to us that the critical question, who prepared the security documents, was not one that could be conclusively answered by mere reference to the security documents themselves. In our view, those documents raised questions whether the statement on the face of the security documents that they were drawn by the secretariat should have been taken at face value. With respect, the presumption or finding by the learned Judge that the documents were prepared by Mr. Pesha, being the basis on which the Bank's suit was struck out, was not well founded. As Madan JA cautioned in ***D.T. Dobie & Company (Kenya) Ltd vs. Muchina*** (above) the power to strike out should be exercised only after the court has considered all the facts. Clearly, the learned Judge in this case did not consider all the facts placed before him.

28. We agree, therefore, with counsel for the appellant that the finding by the learned Judge that the guarantee was not drawn by

an advocate was arrived at without evaluating and appreciating all the evidence that had been placed before him. It was not a clear case for striking out. The result is that in reaching his decision, the learned Judge failed to take into account considerations of which he should have taken account of. We are therefore entitled to interfere with the exercise of discretion by the learned Judge. See ***Mbogo vs Shah [1968] E.A. 93***.

29. Given that the finding or presumption by the learned Judge that the guarantee was not drawn by an advocate was the fulcrum on which the decision to strike out the suit was founded, and given also the conclusion we have reached in that regard, it is unnecessary to consider the secondary questions on which counsel addressed us as to whether a guarantee may be prepared by an unqualified person; whether the learned Judge misinterpreted the principles set by the Supreme Court of Kenya in ***National Bank of Kenya Limited vs. Anaj Warehousing Limited*** (above) and whether the Judge ought to have followed the decision of the Supreme Court of England in ***Patel vs Mirza*** (above).

30. In conclusion therefore, we allow the appeal. We hereby set aside the ruling and orders given on 20th December 2016. We substitute therefor an order dismissing the respondents' application dated 26th May 2015 with costs to the appellant.

The appellant will have the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

Deputy Registrar