



Challenger Trade Finance Segregated Portfolio of the South Africa SPC v Danish Brewing Company
E.A. Limited & 3 others (Civil Case E309 of 2020) [2022] KEHC 67 (KLR) (Commercial and Tax)
(31 January 2022) (Ruling)

Neutral citation number: [2022] KEHC 67 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Civil Case E309 of 2020

DAS Majanja, J

January 31, 2022

Between

Challenger Trade Finance Segregated Portfolio of the South Africa SPC

Plaintiff

and

Danish Brewing Company E.A. Limited

1st Defendant

Christopher White

2nd Defendant

Nirav Maheshkumar Dave

3rd Defendant

Linus Wangombe Gitahi

4th Defendant

Ruling

Introduction and Background

- 1.This is the 3rd Ruling in this matter whose facts are common ground and have been featured in the previous rulings. The court entered judgment for the Plaintiff against the 1st, 2nd and 4th Defendants jointly and severally for the sum of USD 1,073,639.12 with interest at 14% per annum from 31st July 2020 on 30th April 2021.
- 2.The 4th Defendant has now approached the court by the Notice of Motion dated 14th June 2021 made under the inherent power of the court principally seeking that the 1st and 2nd Defendants satisfy the aforementioned judgment in the first instance. The application is supported by the 4th Defendant's affidavit sworn on 14th June 2021. It is opposed by the Plaintiff through the its Grounds of Opposition dated 30th June 2020.
- #### The Application
- 3.The 4th Defendant's case is that the Plaintiff and the 1st and 2nd Defendants have in the past attempted to agree on payment of the judgment sum in installments or in lump sum and but that from correspondence among the parties this amount has not been paid and the Plaintiff has decided to proceed with execution proceedings against the Defendants.

4.The 4th Defendant states that he has learnt from the 2nd Defendant that the ownership of the 1st Defendant has changed due to the transfer of shares in the company by previous shareholders and that the new shareholders of the 1st Defendant will settle the judgment sum.

5.The 4th Defendant contends that the 1st and 2nd Defendants agreed to indemnify him in the event the Plaintiff's claim against Defendants is successful and with the transfer of the 2nd Defendant's interest in the 1st defendant and considering the 2nd Defendant is a foreign national, there is imminent danger that the 4th Defendant will be left exposed to settle the judgment sum alone. The 4th Defendant therefore submits that it is only fair that the 1st and 2nd Defendants be ordered to pay the entire judgment sum.

The Plaintiff's Reply

6.The Plaintiff opposes the application on the grounds that it has no legal basis and that the court's inherent power cannot be invoked where there are express powers provided to remedy a situation. It contends that the 4th Defendant is jointly and severally liable to satisfy the judgment and that he has neither appealed against it nor sought its review. Further, he has not sought to satisfy the judgment in installments which are the available avenues to the 4th Defendant to qualify or alter his obligations under the judgment. The Plaintiff points out that the settlement offers made by the 1st and 2nd Defendants before the Court have not been honored.

Analysis and Determination

7.I have considered the application and deposition and I hold that in as much as the 4th Defendant invokes the inherent power of the court in seeking that the 1st and 2nd Defendants satisfy the judgment in the first instance, I have no doubt that he is in essence seeking to review the judgment entered against him on 30th April 2021. The power of the court to review its decision is found in the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) more specifically section 80 and Order 45 Rule 1 of the Civil Procedure Rules. A court cannot invoke its inherent power, if there are specific provisions in the Act and Rules dealing with the specific issue and this power can only be invoked to support the provisions of the Act and Rules but not to override or evade other express provisions thereof. (see *Trust Bank Limited (In Liquidation) v Ajay Shah & another* ML HCC Application No. 294 of 2010 [2020] eKLR and *Stephen Karanja & 4 Others v Thomas Barasa NRB HCCC* No. 1009 of 2004 [2007] eKLR).

8.I do not hear the 4th Defendant stating that there is any discovery of evidence or error apparent on the face of the record to warrant the review of the judgment. If anything, he is attempting to re-agitate his case on matters that the court has already pronounced itself on. The court's position the ruling of 30th April 2021 has not changed when it was held in part that:28. Since the 4th Defendant is a guarantor, it is only the Plaintiff who can discharge him from his contractual obligation. The 4th Defendant has not pleaded anything in his defence that would otherwise discharge him from his obligation to the Plaintiff. He is of course entitled to pursue indemnity from the 1st and 2nd Defendants which is an issue that does not involve the Plaintiff

9.The fact that the 1st Defendant has new owners is of no consequence to the Plaintiff. The Guarantee and Indemnity remains an independent and collateral agreement between the Plaintiff and the 4th Defendant. The fact that the 1st and 2nd Defendant are ready and willing to indemnify the 4th Defendant does not concern the Plaintiff and remains an internal issue between the 1st, 2nd and 4th Defendants. As long as the Guarantee has not been discharged, it remains binding on the 4th Defendant and he is obligated to abide by its terms.

Disposition

10.I dismiss the 4th Defendant's application dated 14th June 2021 with costs to the Plaintiff

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.D. S.
MAJANJAJUDGECourt of Assistant: Mr M. OnyangoMr Ogunde instructed by Walker Kontos Advocates
for the PlaintiffMr Kimani, SC with him Mr Tugee instructed by Hamilton, Harrison and Mathews
Company Advocates for the 4th Defendant.



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