Vibhuti Hardware Limited v Mirage Supply & Contractors Ltd (Civil Suit E771 of 2021) [2022] KEHC 149 (KLR) (Commercial and Tax) (27 January 2022) (Ruling)

Neutral citation: [2022] KEHC 149 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E771 OF 2021

JN MULWA, J

JANUARY 27, 2022

BETWEEN

VIBHUTI HARDWARE LIMITED ..... PLAINTIFF

AND

MIRAGE SUPPLY & CONTRACTORS LTD ..... DEFENDANT

RULING

1. The Applicant/Plaintiff Vibhutti Hardware Limited approached this court by its application dated 30/9/2021 filed under provisions of Order 2 Rule 15, Order 36 rules 1(a) and (2) of the *Civil Procedure Rules* (CPR) and Sections 1A, 1B and 3A of the *Civil Procedure Act*, and Section 49 of the Sale of Goods Act, Cap 31 Laws of Kenya seeking for ORDERS against the Respondent/Defendant:

> That the Honourable Court be pleased to summarily enter judgment against the Defendant/Respondent for the sum of Kshs. 25,112,750/= together with interest thereon at court's rates from 18th August 2020 until payment in full, together with costs of the application.

2. The grounds for the application are stated at the face of the application that the claim is a liquidated sum based on the defendants failure to pay for goods supplied to the Respondent/Defendant by the Plaintiff/Applicant, and upon the supporting affidavit sworn by the Applicant's director one Nikesh Popatlal Shah on the 30/9/2021.

3. The claim is vehemently denied by the Defendant/Respondent who, upon being served with the statement of claim and the application, filed it Memorandum of Appearance and a statement of defence dated 4/10/2021 within the stipulated period of 15 days as provided under Orders 6 and 7 of the Civil Procedure Rules and a Replying Affidavit in opposition to the application sworn on the 19/11/2021.

4. The Applicant's submissions are dated 29/11/2021. It is its claim that vide an oral contract, the Applicant supplied to the Respondent assorted building materials on diverse dates between 26/6/2020 and 22/8/2020 to the tune of the sum of Kshs. 25,112,750/=. It is further its claim that invoices sent to the defendant also served as Delivery notes as provided under the oral contract.

5. Though the Applicant purports to have sent the said invoices and annexed them to the Supporting Affidavit as "Annexture NPS-1" no such invoices are annexed. That too is the position for alleged postdated cheques that were dishonoured "annexture NPS – 2 and "NPS-4 an alleged letter by the defendant admitting the claim – "annexture NPS – 4". There is also a purported unsigned settlement agreement written by the Defendant to the Plaintiff "Annexture NPS -5", which is also not annexed.

6. The Applicant cites provisions of Order 36 Rule 1(1) CPR to urge the court that the claim being a liquidated claim, it was proper for the summary judgment application to be made to avoid the slow wheels of justice in a full hearing in what it calls a clear and obvious case, where the amount claimed has been ascertained.

7. It is a further submission by the Applicant, citing Order 36 Rule 1 CPR, that the application was filed on the 4/10/2021 before the defence was filed and therefore the defence on record dated and file on the same date 4/10/2021 is irregularly on record as no leave was obtained to file the defence. Several cases are cited in support of the above submissions.

8. For the Respondent/Defendant, its submissions are dated 9/12/2021, primarily to the effect that it filed its defence which raises numerous triable issues (No. 18) and therefore, summary judgment cannot be entered as the Applicant's case is not clear, plain, obvious or "open and shut" case hence should be allowed to go for full trial. Briefly, the Defendant denies existence of any form of contract between the parties, denies any deliveries of the alleged goods to itself, denies receipt of any invoices and delivery notes, nor any Local Purchase Orders to support the claim.

9. It is further a submission by the defendant that this is a case which can only be determined upon interrogation by the court in a full trial. Likewise, the defendant has cited several court decisions. I will come to them later in this ruling.

10. Order 36 Rule 1 Civil Procedure Rule provides that:

    1. In all suits where a plaintiff seeks judgment for

        a) A liquidated demand with or without interest; or

        b) Recovery of land, with or without a claim for rent or mesne profits by a landlord from a Tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

11. What then is a liquidated claim or demand? A liquidated claim is defined in The Supreme Court Practice Volume 1 at page 33 as:

> " A liquidated demand is in the nature of a debt i.e a specific sum of money due and payable under or by virtue of contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum, even through

> it be specific or named as a definite figure requires investigation beyond mere calculation, the sum is not a "debt or liquidated demand" but constitutes "damages".

12. The above definition has been followed in the case *Robert Ngari Gateri Vs Maringo Transporters & others [2005] eKLR, Musinga J, as he then was, in Nakuru Civil Appeal No. 81 of 1995*

13. The amount must be ascertained or capable of being ascertained even though it is so stated. However, if it requires further investigation, then it cannot be said to be a liquidated amount – *Postal Corporation of Kenya and Another vs Aineah Likumba Asienya & 11 others, Nairobi CA Civil Appeal No. 275 of 2014 [2018] eKLR*, *Trust Bank Limited v Anglo African Property Holdings Limited & 2 others Nairobi HCCC No. 2118 of 2000 (UR).*

14. The Plaintiff's/Applicant's claim is based on an alleged oral contract, by Invoices and delivery notes as submitted by the Applicant. I have stated earlier (above) that no such Invoices, delivery notes or Local Purchase Orders were exhibited in the Supporting Affidavit, a position taken by the defendant/ Respondent in its statement of defence dated 4/10/2021 where it is denied existence of any contract oral or in writing, with a submission that the relationship between the two parties was upon request, by issuing Local Purchase Orders indicating the goods required and the quantity thereof.

15. Further, the defendant denies that the invoices, if any, did not show the actual goods described, and if so, it would pay to the Plaintiff the purchase price upon receipt of the alleged invoices and or on demand.

16. In the absence of the alleged invoices, Local Purchase Orders and delivery notes, it cannot be ascertained by this court, at this stage, that the claim is indeed a liquidated claim. It is an amount that is not already ascertained or capable of being ascertained - *AfricanStalking (K) Ltd vs Samuel Otieno Obuoya T/A One Village Freelancers [2021] eKLR*.

17. Order 36(1) Civil Procedure Rules goes on to state that:

> (1)(b)... where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed or part thereof, and interest, or for recovery of the land and rent or mesne profits.

18. There is no dispute that the defendant appeared and filed its defence dated the 4/10/2021 the same date the application was filed. Both the application and the defence were filed on the same date, the 4/10/2021. In the premises, unless the time is indicated as to when each was filed, then, I think it is safe to state that both having been filed on even dates, then the defence was not filed after the application, nor the application after the defence.

19. To that extent, I am of the very considered view that Provisions of Order 36 Rule (1)(b) do not apply, as the Defendant had appeared and filed its defence at the stipulated time and therefore no leave of court is necessary for the defendant to be allowed to defend the case as that is already overtaken by events. Even if it was so, Article 159 (2)(d) of the Constitution would offer some relief, that being a technical procedure that ought not to overshadow justice of the matter.

20. In *ELC No. 679 of 2012 Igi Holdings Limited vs Tropical Farm Management Kenya Ltd and another (unreported)*, the court rendered that:

> "The purpose and objective of Order 36 Rule 1(a)(b) is to enable a plaintiff who has a plain and obvious case to which a Defendant cannot possibly raise a bona fide defence to obtain a

summary judgment and in that manner save on the delay and expense that would ordinarily follow if the Defendant was allowed to defend the claim".

21. Looking at the Defendant's defence, it is obvious that the Plaintiff's claim is not an "open and shut" demand.

22. All the Plaintiff's facts in support of the claim are controverted in the defence contrary to the Plaintiff's averments. For instance, there is no demonstration by the Plaintiff that there were invoices and delivery notes issued to the defendant and if they are there, they are not exhibited in the application. The unpaid cheques if any, are also not shown nor evidence that the goods were ever requested for by way of Local Purchase Orders, and supplied, and delivered without evidence of duly signed delivery notes.

23. The Court of Appeal in the *Postal Corporation of Kenya vs Inamdar and 2 others [2004] 1 KLR 359* rendered that:

> "the Law is now settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend"

24. The above sentiments were echoed in numerous decisions; *Kenruss Medics Limited and another vs Pasaiba Tourmaline Limited & another [2021] eKLR*, *Moi University vs Visra Builders Limited CA No. 296/2004 (unreported).*

25. In the case of Saudi Arabian Airlines Corporation vs Premium Petroleum Company Ltd. [2014] eKLR, the Court defined a triable issue thus:

> "...thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham, it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the *Shedrian J Test in Patel V E.A. Cargo Handling Servies Ltd* [1974] E.A 75 at page 76 (Duffus P) that "... a triable issue ... is an issue which raises a prima facie defence, and which should go to trial for adjudication"

26. Considering the defence on record, it cannot be said to be a sham. I am persuaded that it raises, not one, but numerous triable issues that can only be interrogated by evidence in a full trial. I add that the trial issues I have noted may not succeed but they ought to be interrogated in a full trial - Court of Appeal case, *Job Kilach vs National Media Group Ltd [2015] eKLR* an also *Gupta vs Continental Builders Ltd [1976-80] 1 KLR 809.*

27. Finally, summary judgment is a draconian measure and should be given in very clear plain and obvious cases. I must state that the Plaintiff's case and application do not meet the above test. Consequently, the application dated 30/9/2021 lacks merit and is hereby dismissed.

28. Costs of this application shall be in the cause.

DATED AND SIGNED THIS 27TH DAY OF JANUARY 2022

HON. J. N. MULWA

JUDGE