



REPUBLIC OF KENYA



**DB Schenker Limited v Mara EPZ Limited (Commercial Case E668 of 2021)
[2022] KEHC 11330 (KLR) (Commercial and Tax) (12 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 11330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E668 OF 2021**

JN MULWA, J

APRIL 12, 2022

BETWEEN

DB SCHENKER LIMITED PLAINTIFF

AND

MARA EPZ LIMITED DEFENDANT

RULING

1. The plaintiff sought judgment for a liquidated claim in its plaint dated the June 29, 2021 against the defendant as follows:
 - a. USD 199,202.22/=
 - b. GBP 2268.40 and
 - c. Kshs 150,000/=, andstated as being the outstanding debt for services rendered to the defendant by the plaintiff during the period 2020 for which, despite being supplied with the said services and specifically freight services for its cargo from Jomo Kenyatta International Airport to various destinations in Europe, it has failed to pay.
2. Upon being served with the plaint and all necessary documents, the defendant filed a two paragraph statement of defence dated August 16, 2021, thus:
 - a. Admitting the description of the parties.
 - b. Denying each and every allegation of fact as though the same were set out and traversed *seriatim*.



3. By an application dated August 30, 2021, brought under the provisions of order 2 rule 15 of the *Civil Procedure Rules* 2010 (CPR) the plaintiff sought orders that:
 - a. The defence be struck out.
 - b. Judgment be entered against the defendant as prayed in the plaint.
4. The plaintiff's supporting affidavit sworn by its Head of Air Freight, one Fred Gitonga, and the grounds of the application, it is averred that the defence raises no trial issues, is a sham and an abuse of the court process and ought to be struck out, and or expunged from the court record.
5. During the oral hearing of the application, the defendant did not attend court to urge its position despite hearing notice having been served.
6. Mr Onsare advocate for the plaintiff urged the court to strike out the defense as it consists of mere denials that did not deny any specific issue raised, nor was there any dispute as to the services rendered and the outstanding debt or at all.
7. I have considered the pleadings by both rival parties, including numerous email communication in respect of the subject matter. Order 2 rule 15 of the *CPR* provides:

“ 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 court process... and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be”
8. As stated in the case of *The Co-operative Merchant Bank Ltd v George Fredrick Wekesa* – Civil Appeal No 54 of 1999, the Court of Appeal rendered that:

“ the power of the court to strike out a pleading is discretionary, but has to be exercised in very clear and plain circumstances as striking out is a draconian act.”
9. The court went further to state that:

“... the court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment”

See also *DT Dobie & Company (Kenya) Ltd v Joseph Muchina & another* [1980] eKLR
10. I am minded that a plaintiff should not be kept away from judgment by an unscrupulous defendant by a defence that is a sham for purposes of buying time.
11. I have perused the correspondence exchanged between the parties. The defendant made payment offers, not of part of the claim, but the outstanding sums stated in the plaint. No question whatsoever has been raised to deny that the services were rendered, nor that the charges were exorbitant, nor that the outstanding sums were not due and payable.



12. What is stated is a general denial, without offering any specifics. It is worth to state here that the defendant has not filed any responses to the application and as such, the application stands unopposed.
13. In my considered opinion, the defence as filed does not raise any triable issue, and a triable issue is not necessarily one that the defendant may ultimately succeed on, but need only be *bona fide* – *Olympic Escort International Co Ltd & 2 others v Parminder Singh Sandhu & another* [2009] eKLR.
14. What then is a sham defence? In the case of *Jubilee Insurance Company Ltd v Grace Anyona Mbinda* [2016] eKLR, the court quoted with authority the celebrated case of *Saudi Arabian Airlines Corporation v Premium Petroleum Company Ltd* [2014] eKLR where it held that;

“... the power to strike out a suit or defence should be used sparingly and only on the clearest of case, where the impugned pleading is “demurer or something worse than a demurer” beyond redemption and not curable by even an amendment. It raises no bona fide triable issue worth trial by a court. ... a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication.”

Therefore, on applying the test, a defence which is a sham should be struck out straight away.”
15. Without further interrogation, it is my holding that the defence on record is but a sham and I hereby proceed to strike it out.
16. The defence having been struck out, it goes without a doubt that the liquidated claim as stated in the plaint must succeed; by entry of summary judgment, having satisfied myself that no trial issues exist to warrant the suit going through a full trial.
17. Order 10 rule 4 *CPR* provides that:

“Where the plaint makes a liquidated demand only and the defendant fails to appear, in this case the defence is struck out, then, the logical conclusion would be entry of the summary judgment for the plaintiff.”
18. Accordingly, judgment is entered for the plaintiff against the defendant in the sums claimed in the plaint, plus interest from the May 24, 2021 at court’s rates until payment in full. The defendant shall also pay costs of the application and the suit to the plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2022

HON JN MULWA

JUDGE

