



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E296 OF 2019

BETWEEN

AFRICASTALKING (K) LIMITED.....PLAINTIFF

AND

SAMUEL OTIENO OBUOYO T/A ONE VILLAGE FREELANCERS.....DEFENDANT

RULING.

1. The Plaintiff has moved the court by the Notice of Motion dated 18th August 2020 for summary judgment under **Order 36 rule 1** of the **Civil Procedure Rules** (“the **Rules**”). The application is supported by the affidavits of Kevin Karuga, the Plaintiff’s Legal Officer sworn on 18th August 2020 and 11th February 2021. It is opposed by the Defendant through his replying affidavit sworn on 14th December 2020. The court directed that the application be canvassed by way of written submissions which are on record.

2. The Plaintiff’s claim against the Defendant is for KES. 36,409,452.000 as special damages. Its case is that on 13th September 2017, the parties entered into an agreement under which the Plaintiff was to supply the Defendant an API to enable it receive funds from his clients and enable him pay his tutors by *M-pesa*. The Defendant’s business was hosted on the Plaintiff’s platform. The Defendant was given a virtual wallet to conduct the business and two paybills; *Customer 2 Business (C2B) 9***66* for collection of payments from clients and *Business 2 Customer (B2C) 3***74* for payments to the tutors.

3. The Plaintiff claims that from January 2018 to November 2018, the Defendant accessed the system without authorization from the Plaintiff by infringing on the system’s configuration and caused the system to top up the Defendant’s virtual wallet. Each time a top up was received by the Defendant’s *B2C 3***74* paybill from the Plaintiff’s main account due to a low limit, a top up would be recorded in the Defendant’s virtual wallet as well. The Plaintiff adds that the Defendant withdrew specific amounts that ensured that the conditions for a top up from the Plaintiff’s main account to the Defendant’s *B2C 3***74* paybill were met to ensure that the Defendant’s wallet was topped up as well and that this unauthorized access and actions had the effect of the Defendant’s wallet being continuously topped up by the Plaintiff’s system without corresponding deposits by the Defendant.

4. The Plaintiff claims that the Defendant’s fraudulent actions for the period January to November 2018 caused it financial loss to the tune of KES 36,409,452.00 which money formed part of the total pool of deposits by the Plaintiff’s Clients which prompted the Plaintiff to file the instant suit.

5. The Defendant opposed the suit by filing a Defence dated 25th October 2019. While he admits that he in the business of online writing and tutoring, he denies that he was trading in the name and style of *One Vintage Freelancers*. He also denies all the allegations of fraud made against him and urges the court to dismiss the claim.

6. Although both parties have made extensive submissions and cited several decisions on the issue of whether the court should enter summary judgment, I am of the view that the application is easily be disposed of on a preliminary issue. The Plaintiff seeks summary judgment which is governed by **Order 36(1)** of the **Rules** which provides, in part, as follows:

36(1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) the 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. [Emphasis mine]

7. From the facts of the suit I have summarized, the Plaintiff's seeks special damages grounded on fraud committed by the Defendant. The basis for summary judgment is that the claim must be in the nature of "liquidated demand". A liquidated demand is in the nature of a debt, that is, a specific sum of money due and payable under or by virtue of a contract. The amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic but if the ascertainment of the sum of money, even though it is specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes damages. Further, the words 'debt' or 'liquidated demand' do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages is stated to be a definite figure (see *Postal Corporation of Kenya and Another v Aineah Likumba Asienya and 11 Others* NRB CA Civil Appeal No. 275 of 2014 [2018] eKLR, *Cimbria East Africa Limited v Kenya Power and Lighting and Others* ML HC COMM No. 279 of 2016 [2017] eKLR and *Trust Bank Limited v Anglo African Property Holdings Limited & 2 Others* NBI HCCC No. 2118 of 2000 (UR)).

8. I therefore find that the Plaintiff's claim, being one for special damages on account of alleged fraud by the Defendant, is not a "liquidated demand" and cannot sustain an application for summary judgment. The application for summary judgment must therefore fail and is accordingly dismissed.

9. I must however point out that the Defendant's Statement of Defence is a mere denial, is deficient and does not bring out clearly the basis of the defence particularly in view of the averments made by the Plaintiff. Failure to properly plead the defence, may prejudice a fair trial. In light of the overriding objective, I grant leave to the Defendant to amend its defence in order to bring out with clarity, the nature and extent of its defence. If the Defendant had properly pleaded its case, this application may have been unnecessary hence I shall award costs to the Plaintiff.

10. In conclusion and for the reasons I have set forth above, I make the following orders:

(a) The Notice of Motion dated 18th August 2020 be and is hereby dismissed.

(b) The Defendant be and is hereby granted leave to file and serve its amended Statement of Defence within 14 days from the date hereof.

(c) The Defendant shall pay costs of the application and of the proposed amendment.

(d) The matter shall be mentioned on a date fixed before the Deputy Registrar for pre-trial and other directions.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Cherono instructed by V. A. Nyamodi Advocates for the Plaintiff.

Mr Owuocha instructed by Owuocha and Associates Advocates for the Defendant.