REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. E 426 OF 2018

CROWN HEALTH CARE .....PLAINTIFF/RESPONDENT

VERSUS

JAMU IMAGING CENTRE LIMITED .....DEFENDANT/RESPONDENT

RULING

The Plaintiff's application

1. This ruling determines the Plaintiff's/applicant's application dated **18th** September 2019 praying for summary judgment in favour of the Plaintiff against the defendant/Respondent as prayed in the Plaint. The applicant also prays for costs of the application.

2. It's not clear why this application has been pending in court since September 2019, a period of almost two years. To me, interlocutory applications should be determined expeditiously preferably, within **6** months from date of filing. The first time a date was secured for the application was in March 2020, 5 months or so after it was filed. Trial delays are the bane of our legal system. Such long lays in resolving interlocutory applications or main hearings should prick the conscience of any one who cares about the need for speedy resolution of court disputes, a constitutional dictate under Article **159** of the Constitution. Delays undermine public confidence in the administration of justice.

3. The grounds in support of the application are that the defendant's statement of defence is a mere denial and it does not present any defence whatsoever nor does it raise any triable issues and that it is an abuse of the court process. The grounds in support of the application are repeated in the supporting affidavit of Boventure Muema, the Plaintiff's/applicant's Credit Controller dated **15th** September 2019. The crux of the affidavit is that on diverse dates between February 2015 and May 2017 at the instance and request of the defendant, the Plaintiff supplied pharmaceutical products and other related goods to the defendant on credit worth **Kshs. 54,543,558/=**. It is the applicant's case that the said goods were delivered and received by the defendant who made a part payment of **Kshs. 28,872,113/=** leaving a balance of **Kshs. 25,571,445/=** which is due and owing from the defendant. Further, that in an effort to offset the debt, the defendant issued the Plaintiff with cheques which upon presentation on their due dates bounced. In view of the foregoing, the applicant states that the defendant's statement of defence is a mere denial and lacks triable issues.

The defendant's response

4. The defendant filed the Replying Affidavit of Mr. Peter Umar Marenya, its director. The substance of his response is that the defendant's statement of defence dated **12th** March, 2019 raises triable issues because there is a dispute on the balance owed and also that the goods were substandard which constitutes breach of contract on the part of the Plaintiff and such issues can only be determined during the main hearing of the suit. Further, he deposed that both parties have a right to be heard guaranteed under the Constitution. Further, he averred that the applicant did not file a reply to defence, hence, there is a joinder of issues as provided in Order **2** Rule **12** of the Civil Procedure Rules and that the failure is an admission of the allegations in the Statement of Defence. Also, he averred that striking out pleadings is a drastic step that should only be resorted to where a pleading is a sham.

5. It is the defendant's position that the power to strike out a defence should be exercised after the court has considered all the facts, the court should not embark on merits which are reserved for the trial. Additionally, the defendant has *bona fide* issues worth on merit to enable the court to determine the real issues in controversy. Further, striking out a defence is draconian and amounts to denying the Respondent the right to be heard.

The Plaintiff's Replying affidavit

6. In response to the above Replying Affidavit, the applicant filed the Replying affidavit of Brian Sitima, its Head of Legal Services & Compliance essentially reiterating the contents of the affidavit in support of the application. He deposed that the defendant admitted the debt owed vide their letter of the **24th** of January, 2018 and gave payment proposals and addressed the issue of their dishonored cheques. Also, by a letter dated the **5th** of March, 2019 the defendant's current counsel admitted the debt and gave settlement proposals and, in both letters, the defendant or its advocate admitted the claim without mentioning the alleged sub-standard goods. Further, by a letter dated **19th** August, 2019, the defendant admitted the debt and affirmed commitment to continue making payments that had stalled.

7. He averred that the right to file and ventilate a defense is not absolute and in light of the provisions of Section **1A, (1)** & **(3)** of the Civil Procedure Act this right must be measured (especially in the instant case) against the competing right of a Party to seek redress for a valid and legitimate claim and obtain expeditious justice.

The applicant's advocates submissions

8. The applicant's counsel submitted that the defendant admitted the debt vide its letter dated the **24th** of January, 2018 and by its own advocates letter dated **5th** of March, 2019; and that in both letters, there was no mention of the alleged sub-standard goods. He argued that the defendant partly paid the debt thus admitting the same. He cited *Vehicle & Equipment Leasing Limited v Coca Cola Juices Kenya Limited**[1]*** which held that a single triable issue is enough to deny a claimant the summary process; however, the issue must be *bona fide*, though it need not be one that must succeed at the trial and that a court proceeding under Order **36** is entitled to consider the merits of any defense raised.

9. He also cited *Job Kilach v Nation Media Group Ltd* [2] which held that **a *bona fide* triable issue is any matter raised by the defendant which requires further interrogation by the court during a full trial. He** urged the court to be guided by *Gupta & Continental Builders**[3]*** which held that:-

> ***"…if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily."***

The defendant's advocates submissions

10. The defendant's counsel submitted that the defendant's statement of defense raises triable issues since there is a dispute on the balance owed and also it raises issues of substandard goods which is a breach of contract on the part of the Plaintiff which will only come to light during the hearing of the suit, and, that, both parties have an inalienable constitutional right to be heard. He submitted that the applicant did not file a reply to the defendant's defense and so there is a joinder of issue under Order **2** Rule **12** of the Civil Procedure Rules. He argued that the failure to reply to the defense is an admission of the allegations in the defense. He reproduced Order **2** rule **12** of the Civil Procedure Rules 2010 which provides:

> ***[Order 2, rule 12.] Denial by joinder of issue.***
>
> *12. (1) If there is no reply to a defence, there is a joinder of issue on that defence.*
>
> *(2) Subject to subrule (3)—*
>
> *(a) there is at the close of pleadings a joinder of issue on the pleading last filed; and (b) a party may in his pleading expressly join issue on the immediately preceding pleading.*
>
> *(3) There can be no joinder of issue on a plaint or counterclaim.*
>
> *(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.*

11. Counsel relied on *Unga Millers v James Munene Kamau**[4]*** for the proposition that he who does not file a reply to a defense is deemed to have admitted the allegations and argued that the defendant's defense has raised the issue of delivery of substandard goods and thus puts the applicant to strict proof that the goods supplied were not substandard and its incumbent upon the court to determine the same at trial. Counsel submitted that striking out pleadings is a drastic remedy that should only be resorted to only where a pleading is a sham.

12. He also relied on *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu*[5]in which the court cited *D.T. Dobie and Company (Kenya) Ltd v Muchina**[6]*** which held: - "the power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."

13. He argued that every court of law should pay homage to its core duty of serving substantive justice, that courts should recognize the act of striking out a pleading completely divests a party of a hearing, thus, driving such party away from the judgment seat; that the court should be convinced that the defense is a sham nor should a court exercise its opinion in such a case and if the defense raises a triable issue, a defendant is entitled to defend. (Citing *Gupta v Continental Builders Ltd**[7]***). Further, counsel submitted that the court can only determine whether a defense rases a triable issue after a hearing. He relied on *Isaac Awuondo v Surgipharm Limited & Another**[8]*** in which the court referred to *Moi University v Vishva Builders Limited**[9]*** for the proposition that if a defense raises even one triable issue, the defendant must be given unconditional leave to defend. He also referred to *Postal Corporation of Kenya v Inamdar & 2 Others**[10]**; Sultan Hardwares Limited v Steel Africa Limited**[11]*** and *AAT Holdings Limited v Diamond Shields International Ltd**[12]*** for a similar proposition.

Determination

22. For starters, the legal principles underpinning summary judgment are well settled. Summary judgment is to be granted only in the clearest cases and where there is no triable issue capable of going to trial. It is to be granted where the defense set up is a mere sham or a stratagem to delay trial.

23. Order **36** Rule **1(1) (a)** of the Civil Procedure Rules provides that in all suits where the Plaintiff seeks judgment for a liquidated sum with or without interest he may apply for judgment. The burden then shifts to the defendant at Rule **(2)** to demonstrate by affidavit or otherwise

that he should be granted leave to defend. Such leave will be granted if the defendant demonstrates he has a good defense to the action. This position of the law is buttressed by section **25 (b) (ii)** as read with section **81 (2) (f)** of the Civil Procedure Act.[13]

24. If a defendant demonstrates there is a triable issue, the court has no recourse but to grant unconditional leave to defend.***[14]*** The same position was stated by the Court of Appeal in *Momanyi v Hatimy.****[15]*** The purpose of summary procedure is to expedite determination of cases but it is an inappropriate procedure where the court is being invited to decide difficult questions of law which call for detailed argument and mature considerations and which would best be left to evidence at the trial.

25. In *Wenlock v Moloney and Others****[16]*** it was held that unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. The purpose of the proceedings in an application for *summary judgment* is to enable a Plaintiff to obtain a quick judgment where there is plainly no defense to the claim. And where the defendant's only suggested defense is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable .[17] A defendant who can show by affidavit that there is a *bona fide* triable issue is to be allowed to defend that issue without condition. (See the case of *Jacobs v. Booth's Distillery Co*.[18])

14. Summary judgment is appropriate when the applicant shows that there is no genuine dispute as to any material fact and the applicant is entitled to judgment as a matter of law. The applicant bears the initial burden of informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact. A fact is "material" if it might affect the outcome of the case under the governing substantive law. A dispute is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the Respondent. All the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favourable to the Respondent.

15. The quest for summary judgment is based on a trite argument that there are no triable issues of fact and the motion is initiated by a Plaintiff that contends that all the necessary factual issues are settled and, therefore, need not be tried. If there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, summary judgment must be refused as to that cause of action. The purpose of the summary judgment procedure is to afford an innocent Plaintiff who has an unanswerable case against an elusive defendant a much speedier remedy than that of waiting for the conclusion of an action.

16. The court has an overriding discretion whether on the facts averred by the Plaintiff, it should grant summary judgment or on the basis of the defense raised by the defendants, it should refuse it. Such discretion is unfettered. If the court has a doubt as to whether the Plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused. The court can exercise its discretion and refuse summary judgment even if the requirements resisting summary judgment have not been met. Referring to the extraordinary and drastic nature of the summary judgment remedy in *Maharaj v Barclays National Bank Limited*,[19] Corbett JA reasoned as follows: -

> *"The grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus and bad in law."*

17. The test is whether on the set of facts before it, the court is able to conclude that the defence raised by the defendant is bogus or is bad in law. What falls to be determined by this court is whether, on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment or whether the defendant's opposing affidavit discloses such a *bona fide* defence that it should refuse summary judgment. The court must be satisfied that the defence is a sham; and that it raises no *bona fide* triable issue worth a trial by the court.

18. Turning to the facts of this case, the defendant claims that the amount due is disputed and that the goods which were supplied were of poor quality. This sounds attractive. However, on record is a letter dated **24th** January 2018 written by the defendant addressed to the Plaintiff. The defendant wrote as follows: -

> *"We acknowledge receipt of the letter dated 23rd January 2018 and the contents are well noted.*

We have 3 payments running concurrently to Crown Health Care via cheque discounting as follows: -

> *a. The monthly payment of Kshs. 470,000/= of which the original amount was Kshs. 16,589,464/= beginning July 2015 and already ending in June of this year. The current balance is Kshs. 3,899,464/=.*
>
> *b. The monthly payment of Kshs. 316,889/= of which the original amount was Kshs. 11,408,004/= beginning October 2015 and ending in September this year. The current balance is Kshs. 2,852,001/=.*
>
> *c. The monthly payment of Kshs. 737,391.40 of which the original amount was Kshs. 26,546,090.40 beginning July 2016 and ending in June 2019.*
>
> *In the case of the Monthly payment of Kshs. 737,391.40, we started off well with the initial payments all going through. However, in early 2017, our cash flows reduced tremendously mostly attributed to poor business conditions over the last year. In all 8 cheques were declined for payment by the bank, however, there were instances in which the bank assisted in passage of the transaction.*
>
> *Kindly note that we are dedicated to clearing the balances of the 8 cheques that were unfortunately returned unpaid due to decline in business.*

Our proposal is as follows:

a. We will endeavour to clear the 470,000 payments by May of this year and the 316,889 payments by September this year. The effect will be enhanced cash flow that can be directed towards the 737,391.40.

b. Beginning February, we will try to consistently honor the coming instalments of Kshs. 737,391.40.

c. In regard to the failed instalments, we intend to issue replacements from June 2019 to March 2020 as a temporary measure. Kindly reconcile the amount as per discussion.

Finally, in the spirit of partnership, we will endeavour to mend the situation as we continue to do business with Crown Health Care. You need us to be in business to be able to clear the balances. We hope you will continue to support our course.

We look forward to your consideration of our proposal.

Sincerely,

Dr. Peter Umara Marenya

19. A reading of the above letter which was authored by Dr. Peter Umara Marenya, the same person who swore the defendant's replying affidavit leaves no doubt that the defendants defence is a sham, a mere denial aimed at frustrating or delaying the Plaintiff claim. In the letter, the debt is clearly admitted in no uncertain terms. The author even admits issuing bouncing cheques and proposes to remedy the situation. He proceeds to tabulate a repayment plan. There is no mention at all of a disputed amount or the alleged substandard goods. What emerges is that the defendant's defence is an afterthought crafted in bad faith to defeat summary judgment and unfairly delay the conclusion of this case. The defence is a mere denial. The diametrically opposed positions taken by the same defendant in the letter on one side and the sworn affidavit and defence on the other side has not been explained. In my view, it is a clear manifestation of utmost bad faith.

20. Also relevant is the letter dated **5th** March 2019 written by the defendant's advocates clearly outlining a repayment proposal for the same debt. More significant is the fact that the letter was written by the defendants advocates on record and there is no mention of the alleged disputed amount or the alleged sub-standard goods. In *Choitram v Nazari**[20]*** Madan, JA expresses the view that: -

> *"For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning"*

21. In the same case, Chesoni Ag. JA, observed that:-

> *"Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions .. It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially."*

22. Guided by the above jurisprudence, I have no doubt that the defendant clearly admitted the debt. The evident change of mind is in bad faith. A defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence, he has advanced may succeed on trial. With such clear admissions including bounced cheques, it cannot be said that the defendant's defence has a possibility of succeeding. The claim or defense (or a part thereof) has 'no real prospect of success and there is no other compelling reason for the case to be allowed to proceed for a trial.

23. Summary judgment is appropriate if the Plaintiff persuades the court there is no genuine dispute as to any material fact and the applicant is entitled to judgment as a matter of law. A dispute of fact is genuine when a reasonable tribunal viewing the evidence could find in favor of either party. But evidence that is totally one-sided or rests only on speculation or conjecture does not present a genuine issue for trial. Such is the grounds raised by the defendant laid side by side with its own admissions.

24. The attempt to invoke the constitutional right to be heard does not help. There are no constitutional questions before me to warrant invocation of the Constitution. A constitutional question is an issue whose resolution requires the interpretation of constitutional provisions rather than that of a statute.[21] When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional provisions, constitutional rights or constitutional values.[22]

25. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others**[23]*** in which Justice O'Regan recalling the Constitutional Court's observations in *S v Boesak**[24]*** notes that:-

> *"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit,*

purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction." ***[25]***

26. Put simply, the following are examples of constituting constitutional issues; the constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[26] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Before me is an application for summary judgment. The tests for determining such applications are settled. The defendant is required to demonstrate by an affidavit that his defense raises triable issues. There are no constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits/defences disguised as constitutional Petitions/issues when in fact they do no not fall anywhere close to violation of the Constitution or constitutional Rights.

27. It was argued that the Plaintiff did not file a reply to the defence, and therefore it is deemed to have admitted the defendants' averments. The defendant is reading Order **2** Rule **12** of the Civil Procedure Rules and carefully avoiding Order **36** Rules **1** & **(2)** which govern the application before me. Order **36** is a self-contained provision. It is a stand-alone provision. It prescribes its own procedure to govern applications for summary judgment. In fact, the application can even be filed after the filing of an appearance and before the defence is filed. Once the application is filed, the burden is shifted to the defendant under sub-rule **(2)** to show either by affidavit or by oral evidence, or otherwise that he should have leave to defend the suit. The defendant did file an affidavit rehashing essentially the contents of the defence. The Plaintiff filed a supplementary affidavit replying to the same. The attempt to invoke Order **2** Rule **12** collapses.

28. In conclusion, it is my finding that the Plaintiff's application dated **18th** September 2019 is merited. Accordingly, I strike out the defendant's defence dated **12th** March 2019 and enter summary judgment in favour of the Plaintiff against the defendant as prayed in the Plaint in the sum of **Kshs. 25,571,445/=** plus interests thereon at court rates from date of filing suit until payment in full. The defendant shall pay to the Plaintiff the costs of this suit plus interests thereon at court rates from the date of taxation.

Orders accordingly

Signed, dated and delivered via e-mail Dated at **Nairobi** this **30th** day of **July 2021**

John M. Mativo

Judge

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[1] {2017} e KLR.

[2] {2015} e KLR.

[3] (1976-1980) KLR.

[4] {2005} e KLR.

[5] {2009} e KLR.

[6] {1982} KLR 1.

[7] *Civil Appeal No 33 of 1977 B.*

[8] {2011} e KLR.

[9] Civil Appeal No. 296 of 2004.

[10] {2004} 1 KLR 359 at p. 365.

[11] {2011} e KLR.

[12] NBI HCCC NO 442 OF 2013.

[13] Cap 21, Laws of Kenya.

[14] See Osondo v Barclays Bank International Limited {1981} KLR 30.

[15] {2003} 2 E.A. 600.

[16] {1965} 1 W.L.R. 1238.

[17] See the cases of *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd. (In Liquidation)* , [1990] 1 W.L.R. 153, 158 and *Balli Trading v. Afalona Shipping, The Coral*, [1993 1 Lloyd's Rep. 1, C.A.

[18] (1901) L.T. 262 H.L.

[19] 1976 (1) SA 418 (A) at 423G.

[20]{1984} KLR 327.

[21]http://www.yourdictionary.com/constitutional-question

[22]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

[23] {2002} 23 ILJ 81 (CC)

[24] {2001} (1) SA 912 (CC)

[25] 2001 (1) SA 912 (CC)

[26] Supra note 5 at paragraph 23.