



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E078 OF 2020

AZALEA HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ESSENTIAL BRANDS LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant herein, Azalea Holdings Limited, sued the defendant/respondent through the plaint dated 16th March 2020 seeking the payment of Kshs 50,786,960.80 arising out of a Head of Terms Agreement.

2. Concurrently with the plaint, the plaintiff filed an application seeking the entry of judgment against the defendant for sum of Kshs 10,000,000 together with interest being the amount alleged to have been admitted by the defendant.

3. The defendant denied the plaintiff's claim through its defence dated 13th August 2020.

4. The defendant opposed the application through the replying affidavit of its Director **Mr. Dilpun Govindi Shah**.

5. The defendant also filed a preliminary objection (P.O.) dated 20th November 2020 wherein it lists the following grounds: -

1. The plaintiff/applicant's suit and application is incompetent, fatally and incurably defective, bad in law and lacks merit.

2. The said application as drawn is improperly before the court and thus orders sought cannot issue.

3. The plaintiff/applicant's suit and the Notice of Motion dated 16/3/2020 is an abuse of the court process.

4. There was no binding contract between the applicant and respondent.

5. The plaintiff/applicant's Notice of Motion dated 16/3/2020 should be struck out with costs to the respondent.

6. This ruling is in respect of the Preliminary Objection which the parties, canvassed by way of written submissions.

7. I have considered the grounds set out in the Preliminary Objection and the parties' respective submissions. The only issue for determination is whether the Preliminary Objection is merited.

8. In the oft cited case of Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors [1969] EA 696, the court discussed what constitutes a Preliminary objection as follows: -

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

9. In the present case, I note that the grounds set out in the Preliminary Objection are merely points of objection to both the suit and the application that do not bring out the specific points of law or uncontested facts.

10. I find that the defendant's claim that there was no binding contract between the parties is a matter of fact that can only be unpacked at the hearing of the suit.

11. For the above reasons, I find that the Preliminary Objection is not merited and I therefore dismissed with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Janira for Plaintiff.

Mr. Mugo for the Respondent.

Court Assistant: Sylvia.