Chimie v Polytanks Limited (Civil Suit 389 of 2016)
[2021] KEHC 326 (KLR) (Commercial and Tax) (29 November 2021) (Ruling)

Neutral citation: [2021] KEHC 326 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 389 OF 2016

MW MUIGAI, J

NOVEMBER 29, 2021

BETWEEN

SNETOR CHIMIE ..... APPLICANT

AND

POLYTANKS LIMITED ..... RESPONDENT

RULING

1. Judgment be entered for the Plaintiff against the Defendant/Respondent for a sum of USD 382,558.76 and the Defendant's statement of defense dated the 2nd November 2016 and filed on the 3rd November 2016 be struck out.

2. Interest be awarded on the principal sum of USD 382,558.76 at the prevailing court rates and in the alternative the Defendant's Directors be compelled to deposit the principal sum of USD 382,558.76 in Court or in a joint escrow account held by the Advocates for both parties (if need be) pending hearing and determination of this Application.

3. In the alternative the Defendant's Directors be compelled to deposit the principal sum of USD 382,558.76 in Court or in a joint escrow account held-by the Advocates for both parties (if need be) pending hearing and determination of this suit.

   Which Application was supported by the sworn Affidavit of Serge Gaston dated 16th December 2020 and based on the grounds that:

   a) The Defendant admitted to the Plaint as per the Consent Order dated 26th November, 2020, which was entered in Insolvency Petition No. 16 of 2018.

   b) The Plaintiff's claim is for payment of the sum of USD 382,558.76 being money owing for the supply of goods by the Plaintiff to the Defendant. The Defendant defaulted in paying for the

goods supplied and it is indeed admitted in the consent of the parties as expressed in the consent Order dated 26th November 2020 In the Matter of Polytanks Limited (Insolvency Petition No. 16 of 2018), that the sum of USD 382,558.76 is payable to the Plaintiff. It is only fair and just that the Plaintiff gets the payment without undue delay as it has been admitted.

c) The Defendant/Respondent has closed and/or vacated its registered office and place of business and transferred and sold its assets to Polytanks & Containers Kenya Ltd, thereby alluding to inference of fraudulent intention and evasiveness on the Defendant's part.

d) The Plaintiff/Applicant is apprehensive that the Defendant may not be in a position to make good the debt or to make any provision for security for payment of USD 382,558.76.

e) The Plaintiff/Applicant is also apprehensive that the Defendant/Respondent might leave the Jurisdiction of the Court or engage in other actions aimed at deliberately escaping liability for payment of the outstanding amount owed to the Plaintiff/Applicant.

f) The Plaintiff stands to suffer irreparable harm and loss if no security, guarantee or undertaking is made to the Plaintiff to cover for the outstanding debt owed to the Plaintiff.

REPLYING AFFIDAVIT

1. The Application was opposed vide the Replying Affidavit of Derrick Correa dated 4th June 2021 and stated that;

    1. The Application before the Court lacks substratum and is merely an exercise brought with the intention of defeating the cause of justice, an abuse to court process and was only brought as an escapist way of avoiding due process.

    2. The proceedings in this suit should be halted pending the determination of insolvency proceedings in Insolvency Petition No 16 of 2018; In the matter of Polytanks Limited which was filed by the Respondent.

    3. The said Insolvency proceedings were dismissed for court non-attendance by the Respondent's former advocates rather than because of its substantive lack of merit.

    4. The Respondent herein had applied to reinstate the said Insolvency Petition No. 16 of 2018 and that Application is coming up for hearing on 22nd June 2021. (Marked DC-I is a copy of that Application)

    5. The expressed mutual consent that was affirmed by the court was only intended for action in Insolvency Petition No. 16 of 2018 rather than for the purpose of this suit.

    6. The interests of the Applicant and the Respondent will best be addressed after the determination of Insolvency Petition No. 16 of 2018. Payment of claim sought by the Applicant will be possible if the Respondent herein is put on liquidation as it stands, the Respondent is unable to settle its debts.

    7. Further, that the Applicant's assertion of apprehension of the likelihood of non-payment of debt should not be a basis of making this Application whose intention is to defeat the ends of justice.

    8. The Applicant's assertion that the Respondent's assets were transferred and sold to Polytanks and Containers Kenya Limited are unsubstantiated. The Respondent did not transfer or sell No. I-R. NO. 11895/98 to Polytanks and Containers Kenya Limited as the same had been legally charged by Guaranty Trust Bank (K) Limited to settle the amount owed to the bank.

9. The Applicant's apprehension that the Respondent may be a flight risk is unsubstantiated as the company is duly registered within this jurisdiction and has been conducting its commercial operations in Kenya thus poses no flight risk.

10. The Applicant has failed to disclose and to demonstrate what substantial loss he will suffer should the orders sought be denied pending the substantive hearing and determination of Insolvency Petition No. 16 of 2018. If the prayers sought are granted in their standing form will be outrageous, unfair and will amount to injustice to the Respondent.

11. The Court should dismiss the orders sought by the Applicant in the Application since it is an afterthought and made to subvert justice.

PLAINTIFF'S SUBMISSIONS0

1. The Plaintiff submitted that the Defendant's defense collapses seeing that the claims in the Plaint have been admitted as per the Consent Order dated 26th November, 2020. The Defendant's defense does not raise any triable issue and hence it frivolous and vexatious. On this issue the Plaintiff relied on Order 6 Rule 13 CPR which outlines the provisions of striking out or amending pleadings. This Application has clearly stated the grounds upon which the orders are sought. In *Peeraj General Trading & Contracting Company Limited Kenya & Another versus Mumias Sugar Company Limited (2016) eKLR* the court stated;

> "Whereas the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that that a Plaintiff should not be kept away from his judgment by unscrupulous Defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case. (See the case of Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR). A careful consideration of the facts placed before the court reveals that the Defendant's Statement of Defence does indeed comprise of mere denials, whereas the Plaintiffs have shown that the Defendant has made express admissions with regard to the Plaintiffs' claim."

2. It was the Plaintiff's further submission that judgment be entered against the Defendant pursuant to admission vide Consent Order dated 26th November, 2020. Where there is an admission of claim the same should be made good without delay and unnecessary trial of matters that are not in dispute. Order 13 Rule 2 CPR provides guidance in instances where the Defendant has admitted the claim. The said section was considered extensively in the case of Peeraj General Trading & Contracting Company Limited Kenya & Another versus Mumias Sugar Company Limited (2016) eKLR (Supra)

3. On whether the Plaintiff is deserving of interest the Plaintiff relied on the case of *Highway Furniture Mart Ltd versus Permanent Secretary Office of the President & Another (2006) eKLR* where the court stated;

> "The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In Later v Mbiyu [1965] EA 592, the forerunner of this Court said at page 593 paragraph E: "In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest".

RESPONDENT'S SUBMISSIONS

1. The Respondent submitted that it has formidable defense and raises triable issues and will suffer irreparably if condemned unheard on merit. The Defendant should therefore be accorded a chance to defend the suit on merit. Further, that it is only fair and just for the Defendant to be granted an opportunity to be heard on merit and the Defendant should therefore not be condemned unheard as this will amount to infringement of the principle of fair hearing contrary to Article 50 of the Constitution.

2. It was the Defendant's submission that there is no evidence that the Defendant intended to occasion delay or defeat the course of justice. The court should therefore not shut the Defendant out from justice and thus urged the Court to find in favour of the defendant by dismissing the Application before the Court.

3. In the case of *James Wanyoike & 2 others v C M C Motors Group Limited & 4 others [20151 eKLR* the court quoted the case of *Tree Shade Motors Ltd -vs- DT Dobie & Anor [1995-1998] IEA 324* where it was held that:

> "Even if service of summons is invalid, the judgment will be set aside if defense raises triable issue. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgement aside."

4. On whether interest should be awarded on the principal sum of USD 382, 558.76, the Respondent submitted that an award of interest can only be made if it is proved that the party seeking interest is entitled to that interest. Therefore, a prayer for interest must be proved through evidence and cannot be granted summarily. In the case of *Kenya Commercial Bank Ltd versus Thomas Wandera Oyalo [2005] eKLR* it was held: -

> "I have already stated that the Respondent should have led evidence to justify why he claims interest at a rate of 32% per annum. Since the Respondent failed to prove that fact, then the trial court should have exercised its discretion to award interest under section 26 of the *Civil Procedure Act*. In this case the trial magistrate awarded the rate of interest as prayed as though it was a matter of cause yet the same was not proved. The learned trial senior Resident magistrate therefore acted outside the laid down rules governing interest."

5. On whether the Directors of the Defendant should be compelled to deposit a sum of USD 382, 558.76 pending the hearing of the suit, it was the Respondent's submission that the doctrine of corporate personality provides that upon incorporation, the company becomes a person in its own right and can do many things that a natural person can do. It follows that the company is therefore liable to any person dealing with it for any of its acts or omissions.

6. In the case of *Joel Ndemo Ong'au & Another v Loyce Mukunya [2015] eKLR* the court in its decision quoted Ringera J (as then was) in *Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor. HCCC No. 125 2002 (unreported)* where the court stated:

> "The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company."

7. The Plaintiff has not brought any evidence to the court to show that the directors of the Defendant have been committing fraud and criminal activities in the name of the company thus warranting the

lifting of the corporate veil. Unless the Plaintiff is able to prove to the court the liability of the directors of the Defendant and why the corporate veil should be lifted, the Defendant should not be compelled to shoulder the liabilities.

DETERMINATION

1. The Court considered the pleadings filed by the parties herein and the issues for determination are whether summary judgment should be entered on admission against the Defendant and the statement of defense struck out?

2. The Court shall first consider whether the Defendant has admitted the Plaintiff's claim or part of it. Judgment on admission is provided for under Order 13 Rule 2 of Civil Procedure Rules which provides: -

> "Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or Order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such Order, or give such judgment, as the court may think just."

3. In the *Choitram Vs Nazari (1984) KLR 327* the above provisions were captured under Order XII rule 6. Madan JA (as he then was) in the said decision stated thus: -

> "For the purpose of order XII rule 6, admissions can be express 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. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial. The court may not exercise its discretion in a manner which renders nugatory an express provision of the law."

5. It was the Plaintiff's contention that the Defendant admitted in the consent of the parties as expressed in the Consent Order dated 26th November 2020 In the Matter of Polytanks Limited (Insolvency

Petition No. 16 of 2018), that the sum of USD 382,558.76 is payable to the Plaintiff. On the other hand, the Defendant argued that the expressed mutual consent that was affirmed by the court was only intended for action in Insolvency Petition No. 16 of 2018** rather than for the purpose of this suit. It is noteworthy that the Defendant has not produced any document to show that the said consent order has since been set aside.

6. The said consent by Hon. Lady Justice Nzioka dated 26th November 2020 reads in part as follows; -

> "That the Petitioner/Debtor ascertains and admits its indebtedness towards Snetor Chimie in the Sum of USD 382,558.76"

7. In my view this is a clear, obvious and unequivocal admission of by the Defendant. This admission is plain and obvious and going by the words of Madan JA, there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial.

Whether the Statement of Defence should be struck out?

8. Order 2 Rule 15 of the Civil Procedure Rules provides as follows:

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 process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

9. The Court finds there is Ruling on the same issue to strike out the defense that was canvassed before Hon LJ R Ngetich and vide Ruling of 29th September 2017 found that the documents attached to the Plaint are Invoices worth USD 394,699.21 (Ksh 39,993,490.532). Upon Demand letter by the plaintiff's advocate the Defendant through its lawyer admitted the debt and sought a meeting with the Plaintiff's representatives and no evidence that parties' met was adduced before Court. The amounts in the Delivery notes were contested and the Court allowed the Defendant leave to defend the suit/ claim in a full hearing and restored the defense. To date, the defendant has never taken up the matter to pursue its fair hearing.

10. There are 2 admissions on record, the one before Hon LJ R Ngetich as shown by the pleadings and Ruling of the Court and the other before Hon LJ G Nzioka where the consent was recorded in Insolvency Petition No. 16 of 2018 which was dismissed.

11. The suit was filed 2016 to date it has not been heard. In light of the 2 Consents and an opportunity to be heard exhausted from the foregoing, the Defense raises no reasonable cause of action and the same is dismissed.

DISPOSITION

12. The upshot of the above is that judgment is entered for the Plaintiff against the Defendant/ Respondent for a sum of USD 382,558.76 and the Defendant's statement of defense dated the 2nd November 2016 and filed on the 3rd November 2016 is struck out.

DELIVERED SIGNED & DATED IN OPEN COURT ON 29TH NOVEMBER 2021. (VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE