



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. E024 OF 2021

BAHARI FORWARDERS LIMITED.....PLAINTIFF

-VERSUS-

- 1. ABYSSINIA GROUP OF INDUSTRIES**
- 2. ABYSSINIA IRON & STEEL LIMITED**
- 3. WESTERN STEEL MILLS LIMITED**
- 4. PRIME STEEL MILLS LIMITED.....DEFENDANTS**

RULING

1. Before the court for determination is the Plaintiff/Applicant's **Notice of Motion** application dated **29th March, 2021** brought under the provisions of **Section 1A, 1B & 3A**, all of the **Civil Procedure Act, Order 36 Rule 1** of the **Civil Procedure Rules, 2010** and all enabling provisions of the law. The Plaintiff seeks a summary Judgment be entered against the Defendants as prayed for in the Complaint and in addition, be awarded costs of the application.

2. The application is premised on the grounds on its face and further supported by the **affidavit** of **Meetal Parmar**, the Plaintiff's Chief Account, sworn on **29th March, 2021**. His case is that, the 1st Defendant is a Holding Company for the 2nd to 4th Defendants. That on the request of the 1st Defendant, the Plaintiff offered transport services to the 2nd, 3rd and 4th Defendants on various dates between **March, 2019** and **November, 2020** and the general terms and conditions for carriage were listed in email quotations dated on **1st September, 2018** and **30th August, 2018**. Part of those terms provide that after rendering the services the Plaintiff would present an invoice and payment to be made within sixty (60) days of the same and any late payments would attract monthly interest at the rates of 1.5%. He reiterates that the Plaintiff offered the transport services on the said terms on various dates between **March, 2019** and **November, 2020** but the Defendants failed to make payments as agreed. Therefore, as at **10th December, 2021**, the outstanding amount stood at Kshs.20,492,884.00 which the Plaintiff seeks to be awarded.

3. In opposing the application, the Defendants filed a **Replying Affidavit** sworn on **1st April, 2021** by one **Ravi Gada** who described himself as the Defendant's financial controller. He averred therein that summons were served on the Defendants on **15th March, 2021** and the notice of to enter appearance filed through the Defendants' advocate on **23rd March, 2021**. That subsequently, a statement of defence was filed on **6th April, 2021**. According to him, the application for summary Judgment is not only misconceived or frivolous but also an abuse of the court process because the statement of defence was filed within fourteen days of entering appearance as required under **Order 7 Rule 1** of the **Civil Procedure Rules, 2010**. Besides that, he is also of the view that the Plaintiff's application as a mere tactic seeking to have the Defendants condemned unheard contrary to **Article 50** of the **Constitution** notwithstanding the meritorious defence already filed. For those reasons, the Defendants are beseeching the court to dismiss the application at hand.

4. Directions were issued on consent of the parties that the application be canvassed by way of written submissions and as the record reflects, parties dutifully complied with the Plaintiff/Applicant filing its submissions on **3rd June, 2021** whilst those of the Defendants were filed on **28th May, 2021**.

Plaintiff's Submissions

5. For the Plaintiff two issues for determination were pointed out, being whether the application for summary Judgment is merited at this stage of the proceedings and secondly, whether the Applicant has met the threshold for grant of the orders sought.

6. On the above issues, the Plaintiff submitted that the application is justified as under **Order 36 Rule 1(1)** of the **Civil Procedure Rules**, where a claim is for a liquidated demand, and the Defendant is yet to file a defence then the Plaintiff is entitled to make an application for summary Judgment. In addition to that, where the claim is plain and an obvious one then the application for summary Judgment should not be denied. Therefore considering the case at hand, it is clear that the Defendants agreed to be bound by the terms as contained in the documents annexed in the Plaintiff's list of documents. The Defendants cannot thus allege that there was no executed contract when there exist a list of documents showing the price quotation and conditions for carriage and finally the invoices and delivery notes duly stamped by the Defendant are clear prove that the carriage services were offered. To buttress those submissions, reliance was placed on the cases of **Harit Sheth T/a Harit Sheth Advocates –vs- Shamas Charania [2014]eKLR**, **Postal Corporation of Kenya –vs- I.T Inamdar & 2 Others [2004] eKLR**, **Leo Investment Ltd –vs- Estuarine Estate Ltd [2017]eKLR** and **Affiliated Business Contacts Limited –vs- Kuguru Food Complex Limited Nairobi, Civil Suit No.749 of 1999**.

Defendant's Submissions

7. The Defendants/Respondents submitted that a summary Judgment should only be entered in favour of the Plaintiff when the Defendant fails to raise bonafide triable issues in the statement of defence. That that is not the case here given that the Defendant have not only contested the existence of a contractual relationship with the Plaintiff but also the amount of Kshs.19,658,368.00 has been dispute. Even assuming that the said defence has only raised one triable issue, then the Defendants should be allowed to defend the claim so that a fair hearing is achieved. These submissions were supported with excerpts from the cases of **Chanan Agricultural Contractors Ltd –vs- Mumias Sugar Company Limited [2019] eKLR**, **Peter Maina Kanamba Karienyie Waiyaki Way Developers Ltd & Another [2021]eKLR** and **Jacob Kilach –vs- Nation Media Group Ltd & 2 Others [2015] eKLR**.

Analysis and Determination

8. Having considered the application at hand, the affidavits sworn in support and opposition of the same, the submissions by the parties as well as the cited authorities, in my humble view, the main issue for determination is whether the application for summary Judgment has met the threshold so as to be allowed or whether statement of defence filed on **6th April, 2021** raises triable issues to merit the case proceeding for trial.

9. Summary Judgment has considerably been part of the Kenyan substantive law. It is mainly hinged on the provisions of **Article 159(2)(c)** of the **Constitution of Kenya** which provides that in the exercise of judicial authority, the courts shall ensure that justice is administered without undue delay. Secondly, and **Section 63(e)** of the **Civil Procedure Act**, which enables the court in order to prevent the ends of justice from being defeated to make such interlocutory orders as may appear to the court to be just and convenient. There is also the overriding objective encapsulated in **Sections 1A** and **1B** of the **Civil Procedure Act** oblige the court to ensure just, fair, proportionate and expeditious administration of justice to the parties before it.

10. The procedural law to that extent is provided for under **Order 36 Rule 1** of the **Civil Procedure Rules** which reads as follows;

“Order 36 Summary Procedure

Rule 1

(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,

Where the Defendant has appeared but not filed a defence the Plaintiff may apply for Judgment for amount claimed, or for recovery of the land and rent or mesne profits”

11. It is imperative to add that the rules on summary Judgment are devised to entrench the admirable principle that a Plaintiff's claim, based upon certain causes of action, should not be delayed by what amounts to be an abuse of court process, namely a recalcitrant Defendant, with no *bona fide* defence to the Plaintiff's action, entering an appearance to defend that action, merely for the purposes of delay. At the same time, summary Judgment which entitles a Plaintiff to apply to court to have Judgment entered summarily against such a Defendant, therefore putting an end to the matter and avoiding the Plaintiff being put to the expense of a trial, was never intended to close the door upon a Defendant who could, at the very least, show that there was a triable issue or issues, applicable to the claim. In those instances, a Defendant should be granted leave to defend the action and summary Judgment was refused.

12. This line of thought has been largely reiterated by our courts and to begin with, the Court of Appeal in the case of **ICDC –vs- Daber Enterprises Ltd (2000) 1 EA75** stated that;

“The purpose of the proceedings in an application for summary Judgment is to enable the Plaintiff to obtain a quick Judgment where there is plainly no defence to the claim. To justify summary Judgment, the matter must be plain and obvious and where it is not 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. ”

13. The same court in the case of **Dhanjal Investments Ltd –vs- Shabaha Investments Ltd, Civil Appeal No.232 of 1997**, added that;

“The law on summary Judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of *Kandal Restaurant –v- Devshi & Company (1952) EACA 77* and followed by the Court of Appeal for Eastern Africa in the case of *Souza Figuerido & Company Ltd –v- Mooring Hotel Ltd (1959) EA 425* that, if the Defendant shows a bona fide triable issue, he must be allowed to defend without condition....”

14. Further in the case of **Osodo –vs- Barclays Bank International Ltd. C. A. No. 11 of 1980** the court held that:

“If upon an application for summary Judgment a Defendant is able to raise a prima facie triable issue as the Appellant did in this case, there is no room for discretion. The only course for the court to follow is to grant unconditional leave to defend.”

15. As regards to what constitutes triable issues, in the case of **Kenya Trade Combine Ltd –v- Shah Civil Appeal No.193 of 1999**, the Court of Appeal stated as follows:

“In a matter of this nature, all a Defendant is supposed to show is that a defence on record raises triable issue which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

16. It then follows that a defence which crosses the hurdle of an application for summary Judgment must raise a triable issue. In the present case, the Plaintiff’s cause of action and the basis of the application for summary Judgment is based upon the alleged failure of the Defendants to comply with their payment obligations in terms and conditions evidenced in an email extract annexed in an application for the transport services it offered to the Defendants at their request. It is averred that the outstanding debt is Kshs.20,492.884.00.

17. It is however not disputed that the Defendant filed a statement of defence on **6th April, 2021** denying the Plaintiff’s claim in *toto*. In the same defence, the Defendants have denied having ever procured transport services from the Plaintiff and further avers that there was no contract executed by the parties to that effect. As such, the Defendants aver that they are not indebted to the Plaintiff and the amount claimed is unfounded.

18. In my view, there are triable issues in the defence filed as the court has to establish whether there was an agreement for provision of transport services as alleged by the Plaintiff and if so, what was the outstanding amount arising therein. Justice will be better served if both parties are accorded an opportunity to be heard on merit to enable each of the parties ventilate their issues.

19. I am not persuaded with the contention that the Plaintiff has not satisfactorily demonstrated that the Defendants herein have sought to merely delay or obstruct the cause of justice given that the actual amount owing is a matter for determination at the trial after all the parties have been given an equal forum to ventilate their issues. From the foregoing, it is therefore my holding that the defence filed by the Respondent raises triable issues and as such, the threshold for entering summary Judgment has not been met.

20. In the upshot, it is my finding that the application herein has no merit on the basis that the applicant has failed to satisfy the requirements under **Order 36(1)** and **(5)** of the **Civil Procedure Rules**. In the circumstances, summary Judgment cannot be entered as the Defendants/Respondents’ defence is found to be raising triable issues that ought to be determined at trial. I accordingly dismiss the **Notice of Motion** application dated **29th March, 2021**. Costs of the application shall follow the outcome of the suit.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the Presence of:

M/S Mwaka counsel for Plaintiff/Applicant

Mr. Orare counsel for Respondent/Defendant

Court Assistant - Bancy