



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 219 OF 2018

DIANA ENTERPRISES LIMITED.....PLAINTIFF

-VERSUS-

IMARA STEEL MILLS LIMITED.....DEFENDANT

RULING

1. Before this court for determination are two (2) applications: the first is the Notice of Motion dated 1st November, 2018 brought by the plaintiff and supported by the grounds set out in its body and the facts stated in the affidavit of *Vaishali Kavshik*, in which the plaintiff sought for the orders hereunder:

- i. THAT part judgment be and is hereby entered for indebtedness and/or liability against the defendant.**
- ii. THAT the matter be set down for hearing of the reconciliation of accounts.**
- iii. THAT costs be in the cause.**

2. *Lawrence Wanjohi Thigiti* put in a replying affidavit to challenge the aforesaid Motion.

3. The second Motion dated 8th November, 2018 was filed by the defendant. The Motion is similarly supported by the grounds laid out on its face and the facts stated in the affidavit of its Managing Director, *Lawrence Wanjohi Thigiti*. The defendant in the aforesaid application sought for leave to amend its statement of defence dated 18th October, 2018 and a further order that the amended defence be deemed as duly filed and served. The defendant also prayed for costs of the application to be provided for.

4. In opposing the Motion, the plaintiff put in the following nine (9) grounds in its Grounds of Opposition dated 11th March, 2019:

- i. The application lacks merit, is frivolous and vexatious.**
- ii. The application is a waste of time since the period for filing a counterclaim is over by operation of the law.**
- iii. The proposed amended defence and counterclaim discloses no reasonable cause of action and is therefore irregular and violates the principle of pleadings.**
- iv. The defendant is evading and trying to defeat the plaintiff's application for summary judgment which is properly before the court and is ripe for hearing.**
- v. The defendant's application is an afterthought and is therefore an abuse of the process of this court hence should be dismissed at the first instance.**
- vi. The amendments are prejudicial to the plaintiff.**
- vii. The allegations contained in the defence are remote and cannot form a cause of action since the court order was obtained by full material disclosure and nothing was withheld.**
- viii. The alleged issues of losses incurred are relative and no loss can be attributed to the plaintiff.**

ix. The continued delay by the defendant not to liquidate the lost sums of money is unnecessary hence the suit should be heard and judgment entered.

5. This court heard the two Motions contemporaneously, with *Mr. Lagat* learned counsel for the plaintiff submitting that it is not in dispute that the parties herein shared a contractual relationship at all material times and that there is evidence to the effect that the defendant did not make payments for the supply of scrap metal in the sum of Kshs.26,457,228.11.

6. The counsel further submitted that the proposed amendments were only triggered by an order previously made by this court and are aimed at delaying the fair conclusion of the suit, citing *inter alia*, the case of **Zion Mall Ltd v Mohammed Jama Abdi [2017] eKLR** where the court rendered that a contract entered into on behalf of a company with its express or implied authority is deemed a valid and legally enforceable agreement.

7. *Miss Wawira*, Leaned advocate for the defendant retorted with the argument that no clear admission has been made by the defendant in respect to the plaintiff's claim and that the prayer for part payment is unclear.

8. It was also the Learned advocate's contention that the defendant merely seeks to introduce a counterclaim to its statement of defence and the plaintiff does not stand to be prejudiced in any way.

9. In rejoinder, *Mr. Lagat* submitted that the proposed amendments do not disclose any reasonable cause of action.

10. I have considered the grounds laid out on the face of the two (2) Motions, the facts deponed in the respective affidavits supporting each Motion; the Grounds of Opposition; and the competing oral submissions.

11. A brief background of the matter is that the parties herein entered into a contractual agreement dated 10th March, 2017 in which it was agreed that the plaintiff would continue supplying scrap metal to the defendant and that the defendant would make payments towards the supplies within 7 days from the date of supply. It was also agreed that the defendant would settle the outstanding sums of Kshs.24,001,742.45 at the time of signing the agreement by making payments of 15% of the value of the fresh supply on a weekly basis on top of the fresh supply.

12. According to the plaintiff, it continued to supply the scrap metals to the defendant but the defendant failed to pay the debt, leading to an outstanding debt in the aggregate sum of Kshs.26,457,228.11 which the plaintiff now seeks in his plaint together with damages for breach of contract plus costs of the suit and interest thereon.

13. I will first deal with the Motion dated 1st November, 2018 filed by the plaintiff. In his supporting affidavit, *Vaishali Kavshik* stated that the defendant admitted liability through its replying affidavit dated 22nd October, 2018 and its reply to the demand letter dated 23rd January, 2018, hence the judgment sought is purely for a liquidated claim.

14. The deponent further stated that the defence constitutes mere denials and is not tenable.

15. In reply, *Lawrence Wanjohi Thigiti* averred that the abovementioned correspondences were made on a without prejudice basis and that in any case, the said correspondences do not amount to a clear and unequivocal admission.

16. The legal provision on summary judgments is **Order 36, Rule 1** of the **Civil Procedure Rules** which expresses the following:

“(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 the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

17. The guiding principles in determining an application for summary judgment were succinctly stated by the Court of Appeal in the case of **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania [2014] eKLR** where it held thus:

“The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION V DABER ENTERPRISES LTD, (2000) 1 EA 75 this Court stated that 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 defence to the claims. 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.”

18. The Court above went on to state as follows:

“In DHANJAL INVESTMENTS LTD V SHABAHA INVESTMENTS LTD Civil Appeal No. 232 of 1997, the Court had earlier stated as follows regarding summary judgment:

“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 Kandlal 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 vs Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions...”

19. The Court of Appeal in the above-cited case further appreciated that a triable defence is not one that must necessarily succeed but is one that raises issues which ought to go to trial.

20. The record shows that the defendant herein entered appearance in the suit and filed its statement of defence to deny the claim. I have looked at the statement of defence and I have noted that the defendant therein denies making any orders or receiving any supplies from the plaintiff as claimed and further denies owing the sums claimed.

21. From the foregoing, it is my view that the above issues raised in the defence do not constitute mere denials but are specific issues that ought to proceed for trial for proper determination.

22. I have also looked at the correspondences referenced by the plaintiff and it is my view that the same were made prior to institution of the suit and the defendant has indicated that they were made on a without prejudice basis.

23. Upon studying the said correspondences, it is my view that they do not comprise of a clear and unequivocal admission of liability since the defendant indicated that the amount being sought by the plaintiff is disputed.

24. In view of the foregoing, I am convinced that the circumstances of the suit are not suitable for the entry of summary judgment. Consequently, the Motion dated 1st November, 2018 is hereby dismissed with costs abiding the outcome of the suit.

25. This brings me to the Motion dated 8th November, 2018. *Lawrence Wanjohi Thigiti* in his supporting affidavit stated that at the time of filing the original defence, the defendant was undergoing an audit for loss of business incurred in the period between 22nd September, 2018 and 5th October, 2018 and now seeks leave of the court to include a counterclaim to recover certain sums of money from the plaintiff arising therefrom.

26. I have already listed the grounds put in by the plaintiff in its Grounds of Opposition.

27. The law on amendments of pleadings is well settled. Under **Section 100** of the **Civil Procedure Act**, this court has general power to amend pleadings to correct any defect or error in a suit at any stage of the proceedings on terms as to costs or otherwise as it may deem just and all amendments should be made for the purpose of determining the real question or issues raised by or depending on the proceedings. The above provision is echoed by **Order 8, Rules 3 and 5** of the **Civil Procedure Rules, 2010**.

28. The provision of **Order 8, Rule 3 (1)** of the said **Rules** grants the court the power to allow an amendment of pleadings at any stage of the proceedings as and when it deems fit. I also consider it necessary to mention **Order 8, Rule 3 (5)** which provides the following:

“An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

29. It is clear from the foregoing that the courts have wide and unfettered discretion to allow the amendment of pleadings at any stage of the proceedings before judgment is entered.

30. A vast array of judicial precedents have addressed the subject of amendment of pleadings. In the case of **Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others, CA No. 94 of 2003 [2014] eKLR**, the Court of Appeal considered the principles stated in **Mulla, The Code of Civil Procedure, 18th Ed, Vol. 2 at pages 1751-1752** and adopted the same as follows:

i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;

ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;

iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;

iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;

v. Amendment of a claim or relief barred by time should not be allowed;

vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account

of lapse of time;

vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;

ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”

31. I also found relevance in the case of **St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** constituted in the plaintiff’s bundle of authorities, where the court fundamentally restated the above principles.

32. I now turn my attention to the draft amended statement of defence annexed to the defendant’s Motion. Upon my perusal of the same, I have find that the defendant is seeking to include a counterclaim thereto, which counterclaim it would appear arises out of the original cause of action.

33. I am of the opinion that the amendments sought will assist the court in ascertaining the issues in dispute which will in turn assist in the proper determination of the dispute.

34. Moreover, while the plaintiff stated in its Grounds of Opposition that it stands to be prejudiced if the Motion is granted, it did not demonstrate the manner in which such prejudice will occur or show that any prejudice suffered cannot adequately be compensated through an award of costs. In any event, I am satisfied that the plaintiff will have every opportunity to amend its pleadings accordingly and to further challenge the defendant’s evidence at the trial.

35. In the end,

i. The Motion dated 1st November, 2018 is hereby dismissed with costs to the defendant

ii. the Motion dated 8th November, 2018 is allowed in terms of prayer (i) and the following orders are made resultantly:

a. The defendant shall amend, file and serve its statement of defence within 7 days hereof.

b. The plaintiff shall thereafter amend, file and serve its plaint accordingly if need be within 7 days from the date of service.

c. Costs of the application to abide the outcome of the suit.

Dated, Signed and Delivered at Nairobi this 28th day of February, 2020.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant