

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E390 OF 2019

BETWEEN

GOLDEN AFRICA KENYA LIMITEDPLAINTIFF

AND

DIRE DAWA WHOLESALERS LIMITEDDEFENDANT

JUDGMENT

1. The plaintiff's case set out in the plaint dated 6th November 2019 against the defendant is essentially for goods sold and delivered. The plaintiff states that on various dates between June 2018 and September 2018, it supplied to the defendant at its request, consignments of vegetable oil on credit. Despite receiving the consignments, the defendant failed to pay the plaintiff USD 444,285.44 due and owing as at 24th August 2019.

2. The parties subsequently entered into a Debt Settlement Agreement dated 23rd September 2019 wherein the defendant agreed to pay USD 444,285.44 within 60 days from the date of execution of the agreement but it failed to do so. Despite demand and notice of intention to sue, the defendant failed to honour the agreement causing the plaintiff to file this suit.

3. The defendant did not defend the suit as the court entered judgment in default of appearance and defence. The matter therefore proceeded for formal proof. Before the date fixed for formal proof, Adul Rashid Sharifow, a director of the defendant, filed a Notice of Motion dated 21st July 2020 seeking to be joined as an interested party in his own right and only for purposes of filing and prosecuting the application to set aside judgment. When the application came up for hearing I dismissed it on the ground that it was an abuse of the court process as the interested party had no right to set aside the default judgment against a known defendant as he has no cause of action or defence against the plaintiff's claim. My decision was buttressed by the dictum of Okwengu JA., in *Exclusives Estates Limited v The Registrar of Titles-Nairobi Registry and 5 Others NRB CA Civil Appeal No. 135 of 2013 (UR)* where she stated that, "[21] A court cannot purport to protect a party who has not found it necessary to seek its intervention against a party who has come to it for relief."

4. At the hearing, I heard the testimony of Ankit Bhatnagar who affirmed the contents of the plaint I have outlined above. He produced invoices showing that the plaintiff had delivered to the defendant vegetable oil and the Debt Settlement Agreement dated 24th June 2019 signed by the parties. It is worth noting the Debt Settlement Agreement was signed by the self-same Adul Rashid Sharifow, who had attempted to set aside the judgment in his own right, on behalf of the defendant. All this evidence was uncontroverted and it proved that on the balance of probabilities that the defendant was indebted to the plaintiff as claimed in the plaint.

5. I therefore enter judgment for the plaintiff against the defendant for USD 444,285.44 together with interest at court rates from the date of filing suit, that is, 7th November 2019 until payment in full. The plaintiff shall have the costs of the suit.

DATED and DELIVERED at NAIROBI this 3rd day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Mr Macharia instructed by Robson Harris and Company Advocates for the plaintiff.