



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 101 OF 2017

HASS PETROLEUM (K) LIMITED.....APPELLANT

- V E R S U S -

ALFALAH WHOLESALERS LIMITED.....RESPONDENT

(Being an appeal against the ruling delivered on 3rd march 2017 in Nairobi Chief Magistrate's Court Case no. 2941 of 2016 by Hon. E. A. Nyaloti)

JUDGEMENT

1) Hass Petroleum (K) Ltd, the appellant herein filed an action before the Chief Magistrate's Court, Milimani Commercial Court, to recover a sum of ksh.6,229,845/= from Alfalah Wholesalers Ltd, the respondent herein. The aforesaid sum is said to be the outstanding amount in respect of petroleum products the appellant supplied to the respondent. The record shows that the respondent entered appearance but did not file a defence to deny the appellant's claim. The appellant thereafter filed an application dated 24.6.2016 seeking for summary judgment against the respondent.

2) The respondent filed a replying affidavit of its managing in which it argued inter alia that the appellant had not factored a sum of ksh.900,000/= which it had received from the respondent. The trial magistrate considered the material placed before it plus the rival submissions and came to the conclusion that the proposed defence put forward by the respondent raised triable issues and consequently dismissed the motion for summary judgment.

3) The appellant being dissatisfied preferred this appeal and put forward the following grounds in its memorandum:

i. The learned trial magistrate erred in law and fact in failing to take into account relevant matters while making her ruling.

ii. The learned trial magistrate erred in law and fact in failing to take into account the actual prayers in the appellant's application dated 24th June 2016 and giving a ruling that does not address the issues raised in the appellant's application.

iii. The learned magistrate erred in law and fact in failing to consider and/or acknowledge that the respondent not only admitted owing the appellant but also issued bad cheques which were annexed in the appellant's aforesaid application on which summary judgment must be entered.

iv. The learned trial magistrate fatally erred in law and fact in dismissing the appellant's application dated 24th June 2016.

v. The learned trial magistrate erred in law by considering a draft statement of defence in making her decision of 3rd March, 2017

4) When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. At the time of writing this judgement the appellant was the only party which had filed its written submissions.

5) I have re-evaluated the arguments which were made in support and against the motion dated 24.6.2016 before the trial court. I have also considered the submissions filed by the appellant.

Though the appellant put forward a total of five (5) grounds of appeal, I am of the view that this appeal can be disposed of by one main issue which is whether or not the application for summary judgment was properly dismissed.

6) It is the submission of the appellant that the respondent's draft defence was completely evasive and did not raise any triable issue. It was also argued that the respondent failed to offer any plausible explanation as to why it did not file its defence within the stipulated period. The

appellant further submitted that the draft defence was meant to be used as a delaying tactic to defeat the administration of justice hence summary judgment should have been entered.

7) According to the respondent's submissions made before the trial court, the draft defence raised triable issues. Hon. E. A. Nyaloti, learned Chief Magistrate formed the opinion that the draft defence was not a sham nor a mere denial but raised triable issues which can only be determined at a full hearing. The learned Chief Magistrate proceeded to dismiss the motion.

8) A careful perusal of the motion dated 24.6.2016 and the supporting affidavits will reveal that the appellant had stated that it had supplied the respondent petroleum products worth ksh.28,606,995/= and that the respondent only paid the appellant a sum of ksh.22,377,150/= leaving a balance of ksh.6,229,845.

9) The appellant was also able to show that the respondent had issued cheques which were dishonoured when presented for encashment on its due dates. The appellant urged the trial court to enter summary judgment arguing that the respondent was truly indebted to it as claimed in the plaint.

10) In response to the appellant's motion, the respondent filed a replying affidavit of its managing director in which it clarified in paragraph 4 of the replying affidavit that the outstanding sum was ksh.5,978,500/=. In the draft defence attached to the replying affidavit, the respondent denied owing the amount claimed in the plaint. In the draft defence the respondent avers that the court did not have jurisdiction to entertain the matter since the supply agreement states that any dispute arising from the agreement should be referred to negotiation and arbitration.

11) It is clear from the replying affidavit filed by the respondent that it does not deny the fact that it issued cheques to the appellant which were dishonoured when presented for payment on its due dates. The amount claimed tallies with the outstanding amount less the amount paid of ksh.900,000/=.

12) This court takes note of the fact that the respondent did not file a defence and has given no plausible reason for not doing so. The learned Chief Magistrate therefore fell into error when she formed the opinion that the draft defence raised a triable issue over the accounts. It is clear to me that there is nothing that can go for trial over accounts. The value of the cheques are in agreement with the appellant's claim.

13) The question as to whether or not the matter should be referred to arbitration is simple to answer. **First**, there is no formal application duly filed by either party to persuade this court to issue a referral order. **Secondly**, even if such an application had been made, I do not think the order would have been issued because no dispute capable of undergoing a trial or arbitration has arisen.

14) In the end, I find the appeal to be meritorious. The same is allowed. Consequently, the order dismissing the motion dated 24.6.2016 is set aside and is substituted with an order allowing the aforesaid motion. The appellant is given costs of the appeal.

Dated, Signed and Delivered in open court this 28th day of February, 2019.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent