



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 201 OF 2017

CROWN MOTORS GROUP LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 15th December 2017 and filed on 20th December 2017 was brought pursuant to the provisions of Orders 2 Rule 15 (1) (b), (c) and (d) and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following orders:-

1. THAT the defence dated 1st November 2017 be struck out and judgment be entered for the Plaintiff as prayed in the plaint.

2. THAT the Defendant do bear the costs of this application and suit.

2. The Plaintiff's Written Submissions were dated and filed on 16th November 2018 while those of the Respondent's were dated 27th November 2018 and filed on 29th November 2018.

3. Parties requested the court to render its decision based on its Written Submissions which it relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

4. The present application was supported by the Affidavit of its Sales Manager, Patrick Mugalo, that was sworn on 15th December 2017. Its Further Affidavit was sworn by its Accountant, Simon Musyoka, on 14th November 2018 and filed on 15th November 2018.

5. It contended that on or about December 2015, it bid for a tender to supply the Defendant with various motor vehicle namely:-

a. Two (2) Double Cabins Pick-up.

b. One (1) Single Cabin Pick-up for Environment Energy and Water Sanitation.

c. One (1) Microbus for Health Sector.

d. Two (2) Double Cabin Pick-up for Legal department.

e. Two (2) Double Cabin Pick-up for Energy and Forestry Sector.

f. Four (4) Single Cabin Pick-up Trucks for Roads, Public and Transport.

6. It said that its tender bid was successful and it was awarded the said tender. It was also issued with six (6) local Purchase Orders

(hereinafter referred to as LPOs) all dated 12th April 2016. Notably, it entered into formal agreements with the Defendant on 18th May 2016.

7. It stated that it supplied the Defendant with the twelve (12) units of motor vehicle it had ordered as per the Delivery Certificates. The same were worth Kshs 46,909,001.40/=. However, the Defendant had refused, ignored and/or neglected to pay for the same despite the said motor vehicles having been fitted with special features and registered in its name. It pointed out that after it filed suit, the Defendant paid it a sum of Kshs 11,264,663.80/=. leaving a balance of Kshs 35,644,337.40/=.

8. It was emphatic that the Defendant's relevant department authorised the said supply and their contract was never cancelled as the Defendant had alleged.

9. It was its contention that the Defendant's Defence was a mere denial and did not raise any triable to warrant the suit proceeding to trial.

10. It therefore urged this court to allow its application as prayed.

THE DEFENDANT'S CASE

11. In response to the Plaintiff's present application, the Defendant's Acting Director, Legal Affairs, Violet O Oyangi, swore the Replying Affidavit on behalf of the Defendant herein on 4th April 2018. It was filed on 9th April 2018.

12. The Defendant contended that the Plaintiff had not attached any evidence to prove that it received its letter dated 1st March 2016 awarding the tender and that in any event, it received the Plaintiff's letter of Acceptance on 17th March 2016, which was after the fourteen (14) days as per the letter awarding the tender. It also said that the Contract Agreement was received by the Plaintiff on 27th May 2016 after the Delivery Certificates and that some of the Delivery Certificates were signed way before the Contract was entered into.

13. It also averred that the Plaintiff's application offended the provisions of the Public Procurement And Disposals Act as there must be proof of advertisement of tender, application, award and then performance. It was its contention that if due process was not followed and if items that were ordered were not delivered, then the Plaintiff ought to prove the components of the contract as well as procurement procedures.

14. It was categorical that under the Constitution of Kenya, 2010, every party to a suit must be heard and that it would be greatly prejudiced if the Plaintiff's present application was allowed for the reason its Defence raised triable issues that should be heard in a full trial.

15. It therefore asked this court to dismiss the Plaintiff's application.

LEGAL ANALYSIS

16. Both the Plaintiff and the Defendant were agreed on the law relating to the striking out of pleadings. What they were not agreed upon is whether or not the case herein was suitable for the striking out of the Defendant's Defence herein.

17. The Plaintiff relied on the case of **Five Forty Aviation Ltd vs Finejet Ltd [2014] eKLR** where it was held that:-

“13. The law on summary procedure as clearly appreciated by counsel for both parties is well settled. Both under its inherent jurisdiction and under the provisions of Order 2 Rule 15 (formerly Order 6 Rule 13) of the Civil Procedure Rules the court is clothed with wide powers to either stay and maintain an action or dismiss or strike it out if it is an abuse of its process. The objective of the striking out power, as Lord Buckley stated in the English case of Carl-Zeiss-Stiftung v Rayner [1969] 2 ALL ER 897 at p. 908:-

“...is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation... bound to fail having regard to the uncontested facts.”

18. It also relied on the case of **Mugo Mukunya & 4 others vs Euro Bank Ltd [2013] eKLR** where the Court of Appeal applied the doctrine of estoppel to stop the appellants therein from relying on the *ultra vires* doctrine, having received and benefited from a loan that they had been advanced.

19. It also placed reliance on the cases of **Margaret Njeri Mbugua vs Kirk Mweya Nyaga [2016] eKLR** and **Thorn vs Holdsworth [1876] 3 Ch. 637** where the common thread of the holdings was that a mere denial is not a sufficient defence and that a defendant must demonstrate that he has a good defence for his defence not to be struck out.

20. The question of inflating of costs of a suit where there was no plausible defence was also addressed in the case of **Delphis Bank Ltd vs Caneland Limited [2014] eKLR**.

21. It was emphatic that Article 159 (2) (b) of the Constitution of Kenya stipulates that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles...justice shall not be delayed.”

22. On its part, the Defendant relied on the case of **AAT Holdings Ltd vs Diamond Shields International Ltd [2014] eKLR** where

Gikonyo J rendered himself as follows:-

“[19] There are sound legal and policy consideration which are responsible for the approach taken by the law on this subject; arising from the right of access to and to justice by all parties. On the one hand, there is the Defendant who will be driven from the seat of justice without trial if summary judgment is entered, and on the other hand, you have the Plaintiff who is entitled to expeditious disposal of his case without delay especially where the Defendant has not any defence worth a trial, which, then places the court in a situation where it has to engage in a novel and delicate balancing act of ensuring that; 1) the Defendant gets a fair trial by considering whether a bona fide triable issue exists; and 2) the Plaintiff equally gets fair trial by eliminating such delay in the administration of justice which would keep him away from his just dues or enjoyment of property; this is the basis for the entry of summary judgment under Order 36 of the CPR in appropriate cases. I admit, this balancing act of the rights and interests of parties is most useful in the adjudication of cases, yet quite delicate as well. But courts are experienced at carrying out the exercise by following the laid down principles of law enunciated above.”

23. It also relied on several others case addressing the different grounds of striking out a pleading but which state that pleadings should only be struck out in plain and obvious- See Development Surinder Kumar By vs Agility Logistics Ltd [2014] eKLR, DT Dobie & Co (Kenya) Ltd vs Muchina [1982] KLR, Patel vs EA Cargo Handling Services Ltd [1974] EA 75 amongst other cases. It was its submission that the Plaintiff's application had not met the threshold for striking out its Defence.

24. Just as Gikonyo J observed in the case of AAT Holdings Ltd vs Diamond Shields International Ltd (Supra), this court also took the view that where an application for striking out of a pleading is brought before court, the consideration to be made is whether or not that party's case is so useless that it cannot be saved. The facts must be so plain and obvious to any legal mind that such party ought not to be allowed to waste judicial time or waste monetary and other resources of its opposing party the circumstances set out in provisions of Order 2 Rule 15 (1) of the Civil Procedure obtain in that case. In other words, the court must weigh against a party's constitutional right to be heard as contemplated in Article 50 of the Constitution of Kenya against the equally important constitutional right of his opponent having his dispute resolved without delay stipulated under Article 159 (2) (b) of the Constitution of Kenya.

25. This court carefully analysed the Affidavit evidence, that was placed before it and discerned both that both the Plaintiff and the Defendant therein entered into a contract whereby the Plaintiff was to supply the Defendant with the aforementioned motor vehicles. The documentary evidence that was adduced by the Plaintiff clearly showed that it was awarded the tender to supply the aforesaid motor vehicles, the Defendant issued LPOs, the Plaintiff supplied the said motor vehicles, the Defendant took delivery of the said motor vehicles, the motor vehicle were then transferred into the Defendant's name but that the Defendant had declined, ignored and/or refused to pay the purchase price of the said motor vehicles in the sum of Kshs 46,909,001.40/=, which was properly documented.

26. The question of the flouting of procurement laws was not an issue that was before the court as it was not raised in the Defendant's defence. The Defendant's assertions that it did not have any agreement with the Plaintiff or that it never signed any delivery notes or that the motor vehicle were supplied without authority or that the Plaintiff had not tendered any proof of advertisement of the tender were mere denials that were negated by the dearth of documentary evidence that was placed before this court by the Plaintiff showing that it fulfilled its duties and obligations under the contract.

27. In fact, the Defendant did not deny having paid the Plaintiff the sum of Kshs 11,264,663.80/= after the suit was filed. The mere payment of the said sum was acknowledgment of the debt the Defendant owed the Plaintiff. Indeed, the KRA forms showed that the motor vehicles were registered in Defendant's name.

28. In this regard, the Plaintiff had succeeded in demonstrating that the Defendant's defence would prejudice, embarrass or delay the fair trial of the action and it was otherwise an abuse of the process of court.

29. Accordingly, having considered the Affidavit evidence, Written Submissions and the case law that was relied upon by the respective parties herein and having balanced the Defendant's right to be heard and the Plaintiff's right to have its case determined without undue delay, this court came to the firm conclusion that this was a clear and plain case necessitating the immediate termination of the proceedings herein. Prolonging the same would waste precious time and increases costs to the Plaintiff in prosecuting a matter in which no defence had been raised. It was unlikely that if the matter proceeded to trial, based on the documentary evidence that had been placed before this court, the trial court would arrive at a different conclusion.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's Ruling was that the Plaintiff's Notice of Motion application dated 15th December 2017 and filed on 20th December 2017 was successful and the same is hereby granted as prayed therein.

31. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of April 2019

J. KAMAU

JUDGE