



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 31 OF 2018

COPY CAT LIMITED.....PLAINTIFF

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....DEFENDANT

RULING

1. The plaintiff/applicant has filed an application by way of notice of motion dated 11th March, 2019 seeking that the statement of defence by the defendant/respondent be struck out and judgment be entered in favour of the plaintiff/applicant against the defendant/respondent as prayed in the plaint.

2. The application was supported by grounds on the face of the application and supporting affidavit of the applicant's credit control and collections manager, Angeline Yondo. The grounds in support of the application are that the applicant's claim is founded on a contract entered into between them and the respondent sometimes in July, 2016. That the respondent has been in breach of its respective obligations to the applicant and reneged on its obligation to pay the agreed instalments. That the respondent has in its email correspondence from its Chief Executive Officer to the applicant admitted its indebtedness to the applicant and indicated its commitment to pay the said debt. That the applicant's pleadings are concise and provide the specific events and documents in support of its course of action. That the respondent's statement of defence does not raise any bona fide triable issues which should go to trial for adjudication. That the said defence has no merit and is a sham that is otherwise an abuse of the process of the court.

3. The respondent on the other hand opposed the application through the replying affidavit of its advocate, **Elly Kefa Owinyi** in which he depones, inter alia, that it will be unjust and unfair for the respondent to be condemned unheard. That whereas the applicant has specified the liquidated amount it claims from the respondent, it has not enumerated clearly the amounts that have already been paid to it and the amounts that are still owing, which amount can only be ascertained with clarity with a proper trial. That the defence therefore raises triable issues which the breach of performance thereof can only be determined if the issues are subjected to fair trial or merits. That this court should exercise its discretion of striking out a suit sparingly because to strike out a suit summarily is a draconian act that in essence chases away litigants from the seat of judgment without determining their issues on merits.

4. The application was urged in court by the advocate for the applicant **Mr. Anyoka** while the respondent's response was urged by **Mr. Otsieno**, advocate. The advocates basically reiterated the positions taken by the respective parties in their affidavits in support of and opposition to the application.

The Law –

5. The application is made pursuant to the provisions of order 2 Rule 15 (1) of the Civil Procedure Rules which provides that:-

“(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

(a) it discloses no reasonable cause of action or defence in law;

.....”

6. The application is for entry of summary judgment against the respondent. The powers of the court to enter summary judgment in a suit is provided in Order 36 Rule (1) that provides that:-

“In all suits where a plaintiff seeks judgment for –

(a) a liquidated demand with or without interest; or

(b)

may apply for judgment for the amount claimed, or part thereof, and interest, or

.....”

7. The applicant herein is seeking a liquidated demand of Ksh. 23,733,345.95/=, general damages for breach of contract and costs of the suit. The question then is whether the court should enter judgment for the plaintiff for the amount claimed with interest or part thereof of the claim.

8. The general principle in applications for summary judgment is that where the defendant shows a bona fide triable issue he ought to be allowed to defend the suit but that where the defence proffered is a sham then the court should enter judgment for the plaintiff. In **Dhanjal Investments Ltd –Vs- Shabaha Investments Limited Civil Appeal No. 232 of 1997 (1997) eKLR** the Court of Appeal stated that:-

“The law on summary judgment procedures has been settled for many years now. It was held as early as in 1952 in the case of Kandanlal Restaurant versus Devshi & Company [1952] EACA77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd Vs. Mooring Hotel Ltd [1959] E.A 424, that if the defendant shows a bona-fide triable issue, he must be allowed to defend without conditions.....”

9. As to what amounts to a triable issue was stated by the Court of Appeal in **Job Kilach –Vs- Nation Media Group Ltd, Salaba Agencies Ltd and Michael Rono (2015) eKLR** where it was held that: -

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

10. In the instant case the applicant has attached documents to show the contract sum, the documents in support of the payments made by the respondent and the amount owing. There is also email correspondence by the Chief Executive Officer of the respondent to the applicant admitting the contract sum, the payments made and the amount owing, which amount is what is being claimed by the applicant. In the said email the Chief Executive Officer offers to make further instalments and clear the amount owing by end of March, 2017. The respondent through its CEO had then admitted the sum owing of Ksh. 23,733,345.95/=. In **Choitram –Vs- Nazari (1984) KLR 327 Madan JA** (as he then was) stated the following on admissions:-

“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt...”

11. The advocate for the respondent argued that the defence raises triable issues in that the applicant has not enumerated clearly the amount already paid and the amount owing. This was clearly stated in the correspondence exchanged between the parties which amount was admitted by the company’s Chief Executive Officer.

12. There was no ambiguity in the admission by the CEO of the respondent.

The admission herein leaves no room that the respondent was admitting the claim. As such there is no further issue that requires ventilation in a full trial.

13. The respondent in their defence accused the applicant of being in breach of contract particulars of which are:-

(a) Failure to deliver the goods and services procured in accordance with the contract.

(b) Delivering goods and services that do not correspond to sample.

14. Order 7 Rule 5 of the Civil Procedure Rules requires a defence filed by a defendant to be accompanied by, inter alia, a list of witnesses to be called at the trial and copies of documents to be relied on at the trial. If the respondent is disputing the claim they have not filed witness statements and documents to show the issue in dispute. They have instead filed a general defence denying everything even what is admitted in their correspondence with the applicant. I have no hesitation in holding that the defence is all a sham that does not raise any triable issue as far as the liquidated sum is concerned. The defence is therefore for striking out.

15. The upshot is that there is no reasonable doubt that the applicant is entitled to judgment against the respondent. The defence filed by the respondent herein in respect to the claim for liquidated claim is a sham and is therefore struck out. I accordingly enter judgment for the applicant for the liquidated sum of Ksh. 23,733,345.95/= with interest at court rates from the date of filing suit till payment in full, together with the costs of the suit.

16. The claim for general damages for breach of contract to proceed to full hearing.

Delivered, dated and signed in open court at Kakamega this 20th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Abok holding brief for Anyoka for the plaintiff

No appearance for the defendant

Parties:

Plaintiff - absent

Defendant - absent

Court Assistant - Ruto