



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL SUIT NO 3 OF 2018

SHANEEBAL LIMITED PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF HOMA BAY DEFENDANT

RULING

[1] The plaintiff, **SHANEEBAL LIMITED**, is a limited liability company incorporated and registered in Kenya with its principal place of business being at Nairobi, while the defendant, **HOMA BAY COUNTY GOVERNMENT**, is a County Government established under the Constitution of Kenya and a body corporate exercising its constitutional authority pursuant to the County Governments Act, 2012.

On or about the 1st day of February 2016, the defendant awarded to the plaintiff a tender for the supply and delivery of four (4) motor graders at a unit costs of Kshs.12, 850, 000/=.

The tender was accepted by the plaintiff and on the 2nd February 2016, the defendant issued LPO No.2332227 for the supply and delivery of the four graders at the agreed unit cost.

[2] On the 9th February 2016, the first grader was delivered to the defendant vide delivery note No.251 and on the 15th April 2016, the remaining three graders were delivered to the defendant vide delivery note No.261.

The defendant therefore became indebted to the plaintiff in the total sum of Kshs.51, 400,000/= in terms of the LPO raised in favour of the plaintiff.

As at the 22nd day of June 2018, a sum of Kshs.37, 332,758/25 cts had been paid by the defendant to the plaintiff which acknowledged receipt thereof. A sum of Kshs.14, 067,241/75cts remained outstanding with an accrued interest in the sum of Kshs.4, 431,181/= as at the 2nd July 2018. The plaintiff is therefore claiming the outstanding balance and interest from the defendant whom it accuses of breach of contract and breach of the law on public procurement.

[3] The defendant in its statement of defence, denies such breach of contract and breach of the law on public procurement and contends that it never received any delivery of graders as alleged by the plaintiff and as such, is not and has never been under any obligation to pay the plaintiff any amount of money pursuant to the alleged tender.

The defendant therefore prays for the dismissal of the plaintiff's claim with costs.

On 26th July 2018, the plaintiff moved the court vide a Notice of Motion dated 9th July 2018, for orders that judgment on admission be entered in its favour for Kshs.14, 067,241/75 cts and upon grant of such order, leave be granted for it to prove its claim for damages, interest and costs in the main suit.

The application is premised essentially on the provisions of **Order 13 Rule (2)** of the **Civil Procedure Rules, 2010** as well as **Sections 3 and 3A** of the **Civil Procedure Act, 2010**.

[4] The grounds in support of the application are contained in the body of the appropriate notice of motion and are fortified by the averments contained in the supporting affidavit deponed by the plaintiff's director, **IQBAL KASSAM OMARI**, dated 9th July 2018, on which several documents are annexed.

The defendant's objection to the application is based on its grounds of opposition filed herein on 17th September 2018, but dated 30th August 2018.

The application was heard inter parties by this court on 17th October 2018, and whereas learned counsel, **MR. MBAKA**, appeared for the plaintiff/applicant, learned counsel, **MR. NYAUKE**, appeared for the defendant/respondent.

The oral submissions by both counsel have been given due consideration by this court in the light of the grounds in support of the application and those in opposition, thereto.

It is apparent from all the foregoing that the basic issue arising for determination is whether there is an admission of the plaintiff's claim against the defendant and in particular, the alleged indebtedness in the sum of Kshs.51,400,000/= and/or any outstanding balance thereof.

[5] Order 13 of the Civil Procedure Rules, is the most applicable provision of the law in this application.

Under **Rule (1)** of the **Order**, any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party. This is certainly not the case in the present circumstances. There is no admission of the claim by the defendant in its pleadings or in any other form.

Rule (2) of the **Order 13** provides that:-

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the court may upon such application make such order or give such judgment, as the court may think just.”

[6] The defendant as noted hereinabove has not in its pleadings admitted the claim, so on what other basis is the plaintiff applying for judgment on admission??

What the annexures exhibited by the plaintiff (i.e. exhibit marked **“IKO 2-8”**) demonstrate is the existence of a business or contractual relationship between itself and the defendant at a particular period of time.

However, the defendant denies the existence of such a relationship and hence, any monetary or other claim arising from the relationship. This would therefore call for a full trial of the case to determine not only the existence of the alleged contractual relationship but also the authenticity of the documents portraying the relationship.

The defence raised by the defendant gives rise to serious triable issues with capacity to rope in issues relating to public procurement of goods. In any event, the present application is not for summary judgment under **Order 36** of the **Civil Procedure Rules** or striking out pleadings under **Rule 15** of **Order 2** of the **Civil Procedure Rules**.

[7] It is trite law that under **Rule 2** of **Order 13 Civil Procedure Rules**, where an application such as the present one is made on grounds of an admission, then if after arguments and perusal of the documents availed to the court a plain and obvious case emerges, the applicant would be entitled to judgment (See, **TRUST BANK LTD –VS- PANGANI SERVICE STATION LIMITED & OTHERS [2000] KLR 177**).

However, this is not the position herein. The arguments advanced by the plaintiff and the documents it sought to rely on do not create a plain and obvious case for which an order for judgment on admission may issue in its favour even though the defendant's defence comprises of general denial to and traverses which nonetheless call for a full trial of the case.

Ultimately, this court finds that there is no plain and obvious admission of the claim by the defendant and in particular it's alleged indebtedness to the plaintiff in the sum of Kshs.51,400,000/= and/or any outstanding balance thereof.

In the upshot the present application is dismissed with costs to the defendant/respondent.

Orders accordingly.

J.R. KARANJAH

JUDGE

25.10.2018

[Read and signed this 25th day of **October, 2018**].