



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.12 OF 2017

TALENT HIGH TECH TRADING

COMPANY LIMITED.....PLAINTIFF/APPL

VERSUS

DEEKAY RELIEF.....DEFENDANT/RESP

RULING

This is a ruling on the Plaintiff's application dated 31st July 2017. It seeks to strike out amended defence and counterclaim and judgment to be entered for Plaintiff as prayed in the Plaint.

Grounds on the face of the application are that are that the amended defence and counterclaim are a sham and mere denial intended to delay the fair trial of this suit; that the Defendant is truly indebted to the Plaintiff.

The Plaintiff submitted that the Defendant contracted the Plaintiff to supply sanitary pads. That by correspondences in September 2016 the Plaintiff agreed to supply sanitary pads worth USD 175,183.30 and USD 201,461.40 for the first and second consignment respectively.

That after shipment of the goods to Mombasa, the Defendant declined to clear them on the ground that the tender to supply had been cancelled.

The Plaintiff submitted that while the application for summary judgment was pending, the Defendant filed an application for leave to amend the Plaint, which was allowed on 12th July 2017.

That pursuant to the leave, the Defendant filed amended defence and counterclaim on 19th July 2017. Plaintiff filed reply to amended defence and counterclaim on 21st July 2017.

Following amendment of defence and counterclaim, the Plaintiff amended Notice of Motion dated 22nd March 2017 in order to reflect the documents intended to be struck out.

Plaintiff submitted that as shown by annexure to the original application, the agreement and documents of negotiations specified the goods to be supplied and the price.

Plaintiff contends that there was no indication of a tender from a 3rd party.

I have considered rival submissions by Counsels herein. What I wish to consider is whether the amended defence and counterclaim filed raise triable issues.

From pleadings herein, it is evident that the Plaintiff and Defendant entered into an agreement for the Plaintiff to supply Defendant with diapers. It is not disputed that the goods were shipped to Kenya.

The Plaintiff contends that the alleged tender document from Kenyatta National Hospital did not feature in negotiations. The Plaintiff further contends that the correspondents to the effect that the tender had been cancelled were written in January 2017 way back after the goods had been imported; that the correspondence asked for the goods to be returned to China.

Plaintiff submitted that the Defendant's application to strike out the suit on allegation of illegality of the contract between parties herein is an abuse of Court process. Plaintiff submitted that it is not enough for Defendant to deny the claim but reason for denial should be given. Plaintiff's argument is that the defence does not raise triable defence.

In response the Defendant filed Replying Affidavit dated 12th June 2018, Further Affidavit sworn on 11th July 2017 and relied on statement of defence and counterclaim.

The Defendant admitted that it contracted the Plaintiff to supply sanitary pads but the standards of the goods were dictated by Kenyatta National Hospital who had granted him tender to supply. Defendant contends that the Plaintiff who never objected to the same knew fitness for purpose and merchantability standards set by Kenyatta National Hospital.

Defendant further submitted that after importation of the goods, Kenyatta National Hospital tested but did not meet tender specification and failed in various critical essential parameters carried independently by Kenya Bureau of Standards (KBS).

Further, the Defendant pointed out annexure 5 in the Plaintiff's application, which is manufacturer's Authorization form where below the listed goods the Plaintiff extend full guarantee and warranty for the specified goods against the tender documents.

I have considered rival submissions by parties. I have also perused pleadings filed and documents attached; it is my considered view that triable issues have been raised. It would be appropriate to give each party herein an opportunity to be heard. It would be necessary for evidence to be adduced to assist the Court arrive at fair and just determination. From the foregoing, I do dismiss the application herein.

Costs in the cause.

Ruling Delivered, Dated and signed at Nairobi this 25th day of October, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

LANGAT: **COURT ASSISTANT**

MAINA H/B FOR MUTUA: **FOR PLAINTIFF/APPLICANT**

CHARLES MADOWA H/B FOR MS KIRURI: **FOR DEFENDANT/RESP.**