



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 620 OF 2012

HWANSUNG INDUSTRIES (K) LIMITEDAPPELLANT

VERSUS

ELIFURNI FURNITURE LIMITED.....RESPONDENT

**(Being an appeal from the Judgment made on 6th November,2012 by Hon. Mr. C. Obulutsa (SPM)
Milimani Commercial Courts in CMCC No.5582 of 2011)**

JUDGEMENT

1. The Appellant was the Defendant in the lower court. The Respondent who was the Plaintiff in the lower court vide a plaint dated 17th November 2011 sued the Appellant claiming for the sum of Kshs.245,465/= for goods allegedly sold and delivered to the Appellant which goods the Appellant failed to pay for. The goods are stated to be solid doors, Glass doors and drawer faces.

2. *Exparte* judgment was entered against the Appellant but the same was subsequently set aside for lack of proper service. The Appellant subsequently filed it's statement of defence dated 24th July, 2012. The Appellant denied that the goods were sold and delivered to it by the Respondent. The Appellant denied owing the Respondent the sum of Ksh.245,465/=.

3. The Respondent filed a reply to the defence.

4. The Respondent subsequently filed the application dated 16th August, 2012 which sought orders that

1. That the defence filed on 27th July, 2012 and dated 24th July, 2012 be struck out.

2. That judgment be entered for the Plaintiff as against the Defendant as prayed in the Plaint filed on 18th November, 2011.

3. That costs of the Application and the suit be awarded to the Plaintiff.”

The application was based on the grounds stated on its face and was supported by the affidavit of Eliud Gatheca, the managing director of the Respondent company. It was stated that the defence filed failed to answer the Respondent's case and was merely meant to delay the Plaintiff from securing judgment. It was further stated that the Appellant was truly indebted to the Respondent in the sum of Kshs.245,465/= as evidenced by the LPO's, delivery notes and invoices attached to the plaint.

5. The application was opposed. According to the replying affidavit, the defence raised triable issues in that the existence of a contract between the parties was denied. It was further stated that the defence denied that the goods in question were received and the authenticity of the documents filed was questioned.

6. The lower court in its ruling struck out the defence and entered judgment for the Plaintiff as prayed in the plaint. The Appellant was dissatisfied with the said ruling and appealed to this court on the following grounds.

“1. That the learned magistrate erred in law and fact by finding that the appellant had no triable defence worth going for trial.

2. That the learned magistrate erred in law when he failed to consider the principles relating to summary judgment while delivering the ruling.

3. That the learned magistrate erred in law and fact by failing to consider the submissions filed by the appellant and the authority attached thereto.

4. That the learned magistrate erred in law and fact by finding that the respondent had supplied the furniture to the appellant in the sum of Ksh.245,465/=.

5. That the learned magistrate erred in law and fact by finding that there existed a contract of supply of furniture between the appellant and the respondent.”

7. The appeal was heard by way of written submissions. I have considered the said submissions.

8. The application to strike out the defence was brought under Order 2 rule 15 1 (b)(c) and (d) of Civil Procedure Rules which stipulates as follows:

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

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

9. Striking out a pleading is a discretionary power. The principles applicable are set out for example in the Case of **Abubakar Zain Ahmed v Premier Savings and Finance Limited** (formerly Known as **Mombasa Savings & Finance Limited**) & 4 others CA No. 109 of 2004 where the Court of Appeal stated as follows while quoting from the case of **D.T Dobie & Co (K) Ltd v Muchina [1982] KLR**:

“the discretion will be exercised by applying two fundamental, although complementary principles. The first principle is that the parties will not lightly be driven from the seat of judgment, and for this reason the court will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases. The second principle is that a stay or even dismissal of proceedings may “often be required by the very essence of justice to be done, so as to prevent the parties being harassed and put to expense by frivolous vexatious or hopeless litigation.”

10. Turning to the case at hand, it is noted that the statement of defence dated 24th July, 2012 denied that defendant placed an order for the goods in question. It is also denied that the goods were delivered. The invoices and the sum of Ksh.245,645.00 were also denied. Other than making these general denials, nothing else was stated in the defence regarding the said purchase orders, delivery's or invoices in

question. In the replying affidavit, it was contended that whether the goods in question were received and whether the Ksh.245,465/= was owned by the Defendant to the Plaintiff were triable issues. Although the replying affidavit questions the authenticity of the documents relied on by the Plaintiff to wit the purchase orders, the delivery notes and the invoices, it is noted that the statement of defence has not raised any such issues. This is a matter that is therefore not anchored in the pleadings.

11. I have seen the purchase order herein dated 21st December, 2010 and two others 22nd January, 2012 and an amendment of the orders dated 12th May, 2011. These are documents which the Plaintiff reflected as having emanated from the Defendant yet the Defendant failed to give any explanation in respect of the same other than merely stating that the authenticity of the documents was disputed. The Defendant did not state for example whether it issued the said purchase orders or not. The defence has not alleged any fraud.

12. With the foregoing, I am in agreement with the position taken by the lower court that the defence failed to raise any triable issues. The defence is a mere denial. Although striking out a suit is a drastic measure, the defence herein is frivolous, appears calculated to delay the case and is therefore an abuse of the court process. Consequently, I find no merits in the Appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 30th day of March,2017

B.THURANIRA JADEN

JUDGE