



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 112 OF 2016
UKLI AFRICA LIMITED PLAINTIFF
VERSUS
CHEMAFRICA LIMITED DEFENDANT
R U L I N G

1. The Suit in which the application before the Court was started by a Plaintiff brought in the “Fast Track”. In the Plaintiff *“prays for judgment against the Defendant is for (sic) Kshs.4,177,519.60 together with costs and interest”*. The Suit was filed on 12th April 2016. The Summons was signed on 13th April 2016 and the Defendant entered Appearance on 30th May 2016 and filed a Defence on 13th June 2016. As the Plaintiff has not taken the trouble to file an Affidavit of Service, it is not clear whether that was done within the timescales required by the Rules.

2. The Plaintiff then filed a Reply to the Defence on 23 June 2016 and brought an application by Notice of Motion filed on 13th July 2016. That is the Application now before the Court. The Notice of Motion is brought under ***Order 36 Rule 1 of the Civil Procedure Rules Section 1A, 1B and 3A of the Civil Procedure Act and all Enabling Provisions of the Law***. It seeks the following orders:

1. That Judgment be entered for the Plaintiff/Applicant against the Defendant/Respondent for the sum of Kshs.4,177,519.60 plus costs and interest as prayed in the plaint.

2. That costs of this Application be provided for...”

3. The Application is supported by the Affidavit of PrafulChandra Bharmal Shah and the grounds that appear on the face of the application and “on such other grounds to be adduced at the hearing hereof”. The specific grounds relied upon include that:

(1) The Claim is liquidated

(2) The Defendant has no defence to the claim and the defence filed amounts to a mere denial

(3) That the Defence raises no triable issue in respect of the Claim and is intended to delay a fair trial of this suit

(4) The Defendant is truly indebted to the Plaintiff in the sum of Kshs.4,177,519.60.

4. Although the Plaintiff as pleaded refers to a contract which is then not fully particularised, the substance of the Plaintiff is that the Plaintiff supplied various chemicals and goods to the Defendant and the Defendant accepted those goods and has not paid for them. The Plaintiff is willing to set-off against sums due, the cost of goods supplied by the Defendant to the Plaintiff. The Plaintiff and the Application are supported by virtually the same documentary evidence which are delivery notes which were translated into invoices. A schedule is set out at paragraph 5 of the Witness Statement of the Plaintiff's Managing Director. That Schedule shows that the Plaintiff supplied to the Defendant goods to the value of Kshs.7,191,304/=. The Delivery Notes show that the Defendant acknowledged receipt of the goods supplied on the dates indicated during 2013. The Plaintiff's sent the Defendant a Demand Letter dated 11th January 2016. The Parties entered into further "Without Prejudice" correspondence but the Court will not take that into consideration as it is not properly before the Court.

5. The Defendant filed a Defence which can be summarised as follows:

(a) There was no contract between the Parties;

(b) The Defendant has no employee called Mr Raji

(c) The sum attributed to goods supplied by the Defendant are not particularised and the Sum of Kshs. 3,013,784.49 is understated. The Defendant does not put forward an alternative figure or the basis on which the goods were supplied to the Plaintiff by the Defendant.

(d) That the suit is within the jurisdiction of the lower court. However no application for transfer is made.

Noteably the Defence does not aver that the goods were not supplied. The

Defendant also relies on the **Consumer Protection Act No 46 of 2012**, in its entirety applies. There is no explanation as to why that act applies to the Defendant as a consumer rather than a commercial enterprise.

6. In its Reply the Plaintiff threatens to apply for striking out of the Defence on the basis that it offends Order 2 Rule 1(2). The Defendant wishes to strike out the Plaintiff because it is insufficiently particularised. **Order 2 Rule 1 of the Civil Procedure Rules** provides:

1.(1) Every pleading in civil proceedings including proceedings against the Government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the Government, the departments and officers concerned.

The sanction for non compliance is not strike out. In fact the Rules put the onus of the Defendant to act as order 2 Rule 1(2) provides;

"(2) In such proceedings if the defendant considers that the pleading does not contain sufficient information as aforesaid, the defendant may, at any time before the time limited by the summons for appearance has expired, by notice in writing to the plaintiff, request further information as specified in the notice". It appears no such request has been served on the Plaintiff.

7. In the Application before the Court, the Plaintiff relies on Order 36. That provides: **Order 36, rule 1 Summary judgment.**

1(1). In all suits where a plaintiff seeks judgment for— (a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons

claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

In this case the Defendant filed a Defence before the Application was made.

Nevertheless the Plaintiff does not seem to be asking the Court to strike out the Defence.

8. Both Parties have filed detailed Written Submissions which they did not wish to Highlight when given the opportunity. The Court has considered them carefully, including the voluminous list of authorities which were attached and also repeated in the body of the Submissions. The Court is grateful for the hardwork that, no doubt, went into their preparation and they form part of the record so are not repeated here.

9. At its most fundamental the Claim is for payment of goods received. The Goods were delivered and from the stamp and acknowledgment they were received. That is an admission clear and unequivocal of the fact of delivery. The Plaintiff contends that the value of the goods supplied was Kshs.7, 191,304/=. The Plaintiff is willing to allow a credit of Kshs 3,013,784.40 to the Defendant leaving a sum outstanding of Kshs4,177,519.60. The Defendant disputes the sums but does not put forward a positive case, falling squarely in the characterisation of a defence comprising bare denials. The Defence is not accompanied by the documents required by **Order 7 rule 5** enforcing the descriptions of sparse and bare. The Court decides issues on what is before it in the terms of evidence.

10. In the circumstances, the Defence and Grounds of Opposition raise no triable issues. There is no other or additional reason why the dispute should go to the time and expense of a full trial. It is therefore ordered that Judgment be entered for the Plaintiff in the sum of Kshs4,177,159.60 plus interest at the rate of 14% from the date of the demand (11th January 2016).

11. On the issue of costs, the Defendant correctly raised the issue of jurisdictional limits. This was properly a lower court matter. In the circumstances, the Court orders that the Defendant pays the Plaintiffs costs with costs being assessed at the rates applicable in the lower court.

12. This Ruling was scheduled to be delivered on 13th February 2017 however, due to the transfer and leave dates, it was deferred. Any inconvenience is regretted.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS 29th DAY OF March 2017

In the Presence of:

Clerk: Patrick

Applicant: Mr Mureithi

Respondent: Mr Wambugu (Pupil)