



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 356 OF 2013

MTN BUSINESS KENYA LIMITED.....APPELLANT

- V E R S U S -

EDWARD MWANGI THUITA T/A BLUMAN VENTURES.....RESPONDENT

(Being an appeal from the order, judgement and decree of Hon. S. Atambo PM

dated and delivered at Nairobi on 31st May 2013 in CMCC No. 3076 of 2005)

JUDGEMENT

1. Edward Mwangi Thuita t/a Bluman Ventures, the respondent Herein, filed an action before the Chief Magistrate's Court, Milimani Commercial courts, Nairobi against MTN Business Kenya Ltd, the appellant herein, vide the plaint dated 6th June 2012 seeking for a liquidated sum of USD 34,123/27 or its equivalent in Kenya shillings plus interest and costs. The appellant denied the respondent's claim by filing a defence. The respondent filed a reply to the defence and thereafter filed the application dated 25.9.2012 seeking to have the defence struck out. The application was canvassed by way of written submissions. The application was heard and determined in favour of the respondent on 31st May 2013. In essence the appellant's defence was ordered struck out. Being aggrieved, the appellant preferred this appeal.

2. The appellant put forward the following grounds of appeal:

- 1. The magistrate erred in law by striking out the defence solely on the ground that a replying affidavit was not filed by the appellant***
- 2. The magistrate erred in law by ruling that the defence did not raise triable issues in light of the annexures notwithstanding the existence or otherwise of triable issues is not a factor for determination in an application premised on Order 2 rule 15 of the Civil Procedure rules, 2010***
- 3. The magistrate erred in law by not setting out what specifically was scandalous, frivolous or vexatious in regard to how the defence on record was formulated***
- 4. The magistrate erred in law by not setting out what amounted to an abuse of the court process by the defendant filing a defence to the claim against it***
- 5. The magistrate erred in law by not setting out how the formulation of the defence embarrassed***

and/or prejudiced the plaintiff or delayed the trial of the action on merit

6. The magistrate erred in law in failing to hold that whether or not there was a breach of contract was a factual and legal issue that arose from the pleadings thus would only properly be determined by trial

7. The magistrate failed to appreciate that upon the filing of a reply to the defence there was a joinder of issues for determination on the matters raised in the defence thus it could not be said that there were no triable issues

8. The magistrate failed to examine the pleadings filed in the case so as to satisfy herself that the defence fell within the purview of striking out on account of grounds set out at Order 2 rule 15(1) (b), (c) and (d) of the Civil Procedure Rules, 2010

9. The magistrate in her determination of the application exceeded the legal threshold of the issues for consideration on such an application and proceeded to conduct a mini-trial by assessing the probative value of the annexures

10. The magistrate did not apply the proper principles in the determination of the application for striking out, consequently erred in entering judgment on account occasioning a miscarriage of justice.

3. When the appeal came up for hearing, this court gave directions for the appeal to be disposed of by written submissions.

4. I have re-evaluated the submissions made before the trial court.

I have also considered the rival written submissions presented before this court. Though the appellant forward a total of ten grounds of appeal I think the main question posed to this court to answer is whether or not the appellant's defence should have been struck out? It is the submission of the appellant that the trial magistrate failed to appreciate the threshold of striking out a suit. It is said that she failed to weigh the affidavit evidence to determine whether or not what she referred to trial issues existed. It is pointed out by the appellant that the learned magistrate failed to make a finding as to what was scandalous, frivolous or vexatious or what would prejudice, embarrass or delay the fair trial of the action or how the filing of a defence amounted to an abuse of the court process. The appellant further argued that it is apparent from the ruling of the trial magistrate that the court went into the examination of the merits or otherwise of the defence filed through an application. The appellant submitted that its defence raised very serious triable issues which the trial court failed to give due consideration. One of the issues is that the goods supplied were defective and that the issue could only be determined via a trial. The respondent on the other hand supported the decision of the trial magistrate to strike out the defence. The respondent pointed out that when he filed the supporting affidavit he swore in support of the application to strike out the appellant's defence the appellant filed grounds of opposition thus leaving the facts deponed in the supporting affidavit uncontroverted thus making the trial magistrate make a finding that the defence was just a mere denial. It is stated that there was no evidence that the goods supplied by the plaintiff (respondent) were ever defective. The respondent further pointed out that the appellant was in fact paid the said sums which it was to remit to the plaintiff but it opted not for reasons best known to the appellant. The respondent further pointed out that there was no denial and or averment by the appellant that the end user had declined to pay it on account of the goods being defective and hence the delay in paying the respondent.

5. I have set out in detail the arguments of the parties. I have also analysed the manner the learned Principal Magistrate analysed and took into account the competing arguments. The learned Principal Magistrate appreciated the fact that the respondent's application for the striking out of the appellant's defence and for entry of summary judgment is hinged on liquidated sum in respect of the purchase price of assorted goods sold, supplied and delivered to the appellant on credit. Pursuant to the appellant's L.P.Os no. 6560 and 6567 dated 3rd June 2009. In an affidavit filed in support of the application, the

respondent avers that the appellant having been paid should be able to pay the respondent's claim. The respondent annexed documents to the supporting affidavit showing that the appellant had been paid by Ngorongoro Conservation Area Authorities (N.C.A.A) a condition that was precedent to the plaintiff being paid. The respondent further stated that the end user of the goods the plaintiff supplied has never rejected the said goods or equipments and that is why the appellant has since then been paid. In my humble understanding I think the dispute between the appellant and the respondent is straightforward and does not need lengthy explanation nor serious jurisprudential pronouncement. The agreement between the appellant and the respondent is that the respondent would supply the goods and would therefore be entitled to be paid for the value of the amount supplied. There is affidavit evidence that the respondent did supply and delivered the goods requires and was even paid phased out payments and was seeking through the suit the amount in the plaint as a balance since the goods were accepted by Ngorongoro Conservation Area Authority. It is also on record that the appellant did not dispute the invoice raised therefore there was no good reason for the appellant's failure to settle the same yet it had been fully paid on account of the goods, equipment and or services rendered by the respondent. With great respect, the learned Principal Magistrate cannot be faulted when she held that the appellant had failed to controvert the respondents affidavit evidence. There was no evidence showing that the goods, equipments and or services supplied were of inferior quality. Having failed to present affidavit evidence to support its assertion that the goods were of inferior quality, then the trial Principal Magistrate was right to come to the conclusion that the aforesaid defence was a sham and was meant to delay a just conclusion of the matter.

6. In the end, I find no merit in the appeal. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent