

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 410 OF 2015

RADIO AFRICA LIMITED.....PLAINTIFF

- V E R S U S -

NUTURN BATES KENYA LIMITED.....DEFENDANT

RULING

1. Radio Africa Ltd, the plaintiff herein filed an action against Nuturn Bates Kenya Ltd, the defendant herein, seeking for judgment in the sum of ksh.4,720,968 with interest at commercial rates per month with effect from 31.9.2013 until full payment. The defendant filed a defence denying the plaintiff's claim. The plaintiff took out the motion dated 26th February 2016 in which it sought for the defendant's defence to be struck out and for entry of summary judgment as prayed in the plaint. The motion is supported by the affidavit of Robert Kibutiri. The defendant filed the replying affidavit of William Muthiani to oppose the plaintiff's motion.

2. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the application disposed of by written submissions. It is the submission of the plaintiff that the defendant has admitted being indebted to the plaintiff through various correspondences.

3. The plaintiff avers that the defendant has no bonafide defence to the plaintiff's claim and that the defence put forward by the defendant is a sham and is calculated to delay the recovery of the plaintiff's monies. The plaintiff stated that the claim arose out of a breach of contract for the provision of radio advertisement services entered into by the parties to this suit. It is said that it was a term of the agreement and relationship of the parties that the plaintiff would undertake to air radio advertisements pursuant to the defendant's orders and the defendant would pay for the services on accrual basis. The plaintiff annexed to the affidavit of Rober Kibutiri various invoices it issued to the defendant of the radio advertisements it aired via classic 105FM on diverse dates between 17th August 2013 to 6th December 2013. The aforesaid invoices totalled ksh.4,720,968 which the plaintiff now demands to be paid by the defendant. The plaintiff further annexed various emails to the affidavit of Robert Kibutiri allegedly sent by the defendant to acknowledge its indebtedness to the plaintiff in the sum of ksh.5,900,456/=. The plaintiff further averred that the defendant made part payments to reduce the debt through cheques before evading to settle the remaining balance of kshs.4,720,968/=.

4. In response to the plaintiff's submissions, the defendant denied knowledge of the claim. The defendant pointed out that it was served with summons in respect of Nuturn Bates (K) Ltd yet it is known as Nuturn Ltd. The aforesaid entities are said to be totally different companies capable of being sued independently. The defendant further pointed out that the plaintiff heavily relied on admission of indebtedness made by Nuturn Ltd, yet the suit is filed against Nuturn Bates Kenya Limited. The plaintiff did not deem it fit to respond to this submission, which in my view is a valid point of objection. In my view the defendant's argument has put a blur on the plaintiff's claim. The plaintiff has expressly stated that it had entered into an agreement with the defendant to broadcast some advertisements on behalf of the defendant's clients. Those clients included Mumias Sprinkles Drinking water and Mumias Sugar Co. Ltd. There was no agreement exhibited as proof of an agreement executed by the parties. In my humble view, I think this is one of those cases where the court must decline the invitation to allow summary judgment. It is true there are various correspondences showing Nuturn Ltd, admitted owing the plaintiff

monies but the party sued is Nuturn Bates Kenya Limited. There is need to interrogate whether or not the two entities are one and the same thing. This is a triable issue thereof the defence cannot be said to be frivolous. On this ground alone the motion must fail.

5. In the end, I find no merit in the plaintiff's motion. The same is dismissed with costs to the defendant.

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

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant