



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COURT
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE. NO. 37 OF 2016

SHREEJI ENTERPRISES (K) LIMITED.....PLAINTIFF

VERSUS

ABERDARE STEEL AND HARDWARE LIMITED.....DEFENDANT

RULING

1. The Plaintiff and the Defendant have been involved in mutual business transactions. The Plaintiff supplies the Defendant with goods, specifically steel rods and bars for retail and resale.
2. On diverse dates between May 2011 and January 2012, the Plaintiff claims to have supplied the Defendant with goods at the Defendant request. The Defendant paid for part of the good but an amount of Kshs 14,003,439.04 was left outstanding and after an apparently exhausting wait, the Plaintiff decided to move the court to recover the sum outstanding from the Defendant. A Plaintiff was consequently filed in January 2017. Alongside the Plaintiff, the Plaintiff also filed its witness statement as well as a list and bundle of documents. Copies of the invoices were availed. Copies of cheques issued in partial payment were also availed.
3. The Defendant then filed a Defense statement. The Defendant denied generally its indebtedness to the Plaintiff. The Defendant also denied that the Plaintiff supplied it with good.
4. The Plaintiff now asks the court to strike out the Defense Statement and enter judgment for the Plaintiff. The Plaintiff insists that the Defendant's defence is untenable and bare. The Plaintiff claims that allegations of having settled the invoices are also misfounded as there is nothing to support that line of defence. Instead, the Plaintiff contends that there is clear evidence of the Defendant's indebtedness through the cheques issued by the Defendant and dishonoured upon presentment. The Plaintiff states that the defence is merely intended to delay the Plaintiff's claim and no more.
5. In consequence, it is the Plaintiff's position that the Defendant is indebted to the Plaintiff and there is need for the court to invoke its summary procedure and enter judgment for the Plaintiff.
6. Mr. Muriungi who appeared for the Plaintiff largely repeated the above narrative and termed the defence as worthless. Counsel insisted that the Defendant had not offered any explanation on the dishonored cheques.
7. Mr. Nyongesa urged the Defendant's case and insisted that defence statement was tenable. Counsel

insisted that the invoices did not establish that the goods had been supplied and that the cheques were only dishonoured because the Plaintiff and the Defendant had a private arrangement which was to help the Plaintiff's cause and no more. The cheques counsel stated whilst referring to the replying affidavit were never intended to be honoured and the Plaintiff always knew.

8. I have little doubt that the correct position in law is that the court should always encourage settlement of disputes through a merit based determination. The summary procedure of settling disputes should be invoked and applied by the court only in clear cases. Where the defence raises an issue, no matter how minor it appears the court ought to give the defence an opportunity to be heard. The issue need not be one which is winnable. It simply must not be a hapless, frivolous one which really shows no cause of defence. It must not be one merely intended a ruse, with the intention of buying time. The court will mow down the defence if the "defence is so weak that it is beyond redemption and incurable by amendment": see **D.T. Dobie & Company (K) Ltd v Muchina [1982] KLR 1**. Otherwise, if the defence is fair and reasonable the court must not be in a hurry to strike it out as the power to strike out must be cautiously exercised.

9. I have perused the Defense herein. I have also heard counsel and read through the Replying Affidavit filed on 10 May 2017. The defense as put by the Plaintiff's counsel makes no attempt to explain the cheques and what truly the payment were for if not the goods supplied. Indeed, if the cheques were meant to be dishonoured from the get go, why pray would the Defendant offer positive replacement as is evident in the many instances. I take the unreserved view that the defence herein is simply evasive and bare. It has failed to answer the claim with the requisite substance and comprehension. In the circumstances of this case the defence as filed is obviously unwinnable and is bound to fail. I did not hear the Defendant to seek to redeem the same by way of amendment. As it were, the defence is without any possible benefit to the Defendant and can only lead to a pointless and wasteful litigation.

10. In the result, I find that the application to strike out the defence is merited. The defence is fanciful. It has failed to positively answer the Plaintiff's claims that the cheques given by the Defendant and replaced upon dishonor or not replaced at all were all as a result of the goods supplied and delivered and still unpaid for.

11. I see no reason why the defence statement filed by the defendant must continue to survive. I must strike it out and it is so struck out. I also enter judgment for the Plaintiff in the sum of Kshs. 14,003,439.04 together with interest at court rates. The Plaintiff will also have the costs of the application and of the suit.

12. Orders accordingly.

Dated, signed and delivered at Nairobi this 19th day of May, 2017.

J. L. ONGUTO

JUDGE