



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

HCCC NO.389 OF 2016

SNETOR CHIMIE.....PLAINTIFF/APPLICANT

VERSUS

POLYTANKS LIMITED.....DEFENDANT/RESPONDENT

RULING

This is a ruling on application dated 6th March 2017 brought under order 2 Rule 15(1) (a) the Civil Procedure Rules 2010 and section 3A of the civil procedure Act. It seeks to have the Defendant's statement of defence filed on 2nd November 2016 struck out for failing to disclose reasonable defence. It further seeks judgment to be entered for the Plaintiff as prayed in the plaint. Grounds on the face of the application are that the defence filed is a sham as the debt owed is admitted and that the Defendant has filed third party proceedings to ascertain the debt between itself and 3rd party.

In response the Defendant has filed replying affidavit by Manish Kanti Shah the managing director of the Defendant sworn on 2nd June 2017. He averred that the defence has raised triable issues and the Defendant is entitled in law to unconditional leave to defend. He averred that the application is fundamentally defective and cannot be cured even with the breath of overriding objective. He averred that grant of orders sought would extremely prejudice the Defendant. Parties herein filed written submissions and highlighted on 31st July 2017. The applicant submitted that the defence discloses no triable issues. She cited the case of KCB vs Ultra investment limited where it was held that the Defendant failed to attach documents for Court to see and find if there are triable issues. She submitted that the defence should be struck out as there is clear admission of debt. She added that there is email by the Defendant which says we are sorry for the delay in payment and requested the Plaintiff to bear with them for a month.

Counsel for the Defendant submitted that the Plaintiff failed to file supplementary affidavit nor serve further list of documents which show that the facts in the replying affidavit have not been controverted. She submitted that the Plaintiff is trying to deny the Defendant an opportunity to test documents which it has denied. She submitted that the application is premature and prayed that the matter should go for full hearing.

Plaintiff's Counsel submitted that the Plaintiff filed reply to defence and that the Defendant is aware of the amount owing and that there has been part payment; the Plaintiff submitted that there are documents which show that the Defendant admitted the debt. She concluded that there is no bonafide defence, that it should be struck out and judgment be entered for the Plaintiff.

I have perused documents attached to the plaint. By letter dated 8th April 2016 the Plaintiff demanded

payment of kshs USD394, 699.21(kshs 39,993,490.532) from the Defendant. The same day the Defendant through its lawyer admitted that there was a debt owing and went ahead to seek a meeting with the Plaintiffs representative to agree on the amount and mode of payment. The invoices have been attached to the plaint.

There is no doubt that there is admission of money owing to the Plaintiff but the amount admitted has not been shown by any document. There is no evidence that parties met and agreed on the amount or any admission of specific amount. The defence indicate that the amount claimed by the Defendant under delivery notes have been contested, defence further indicate that USD 67,218.80 was one of the payments done in the course of business relationship but not part payment of the amount claimed.

From the foregoing I find that it is true money is owing from the Defendant to the Plaintiff but from the documents Attached do not show the amount owing. From the foregoing I find it fair and just to let the suit proceed to full hearing to establish the amount owing. I am however of the view that before going through full hearing Court annexed mediation be attempted as this is a matter which I feel can be settled out through Court annexed mediation. I do dismiss the application herein and direct do refer this matter to Court annexed mediation. The matter to be mentioned before the Deputy Registrar on the 11th day of October, 2017 for directions. Each party to bear own costs.

Dated, Signed and Delivered this 29th day of September, 2017

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT

.....COUNSEL FOR RESPONDENT

RACHEL NGETICH

JUDGE