

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 468 OF 2013

FRANTO CHEMICALS.....PLAINTIFF

VERSUS

DILPACK KENYA LIMITED.....DEFENDANT

RULING

[1] The Notice of Motion dated **3 May 2016** was filed herein on **6 May 2016** by the Defendant for leave to amend its Defence in terms of the draft Amended Defence annexed to the Supporting Affidavit; and for orders that the Amended Defence be deemed duly filed upon payment of the requisite fees. The application was premised on the grounds that it had become necessary to amend the Defence after discovery of pertinent issues that had been omitted in the Defence that was filed herein on **15 January 2014**. It was averred in the Supporting Affidavit sworn by **Nick Barnes** on **5 May 2016** that the omission was inadvertent and unintentional, and that no prejudice whatsoever would be visited upon the Plaintiffs if the orders sought were granted.

[2] The Plaintiff opposed the application and relied on the Grounds of Opposition dated **11 July 2016**, contending that the application is misconceived and untenable in view of the Court Order made on **19 June 2015**, whose implication is that the Defence stood struck out after 30 days of non-compliance. It was accordingly averred that to grant the orders sought would be to contravene and contradict the Order of **19 June 2015**; which order has never been varied, set aside or appealed. From the Plaintiff's standpoint, the application is not only frivolous, vexatious and scandalous, but it also amounts to an abuse of the court process. The Plaintiff further contended that, contrary to the averments in the Supporting Affidavit, it will be gravely prejudiced if the application were to be allowed, as it would have the effect of reopening the pre-trial conference, yet the Defendant had not complied with the directions of the Court and had been all along indolent in the conduct of their case. In the premises, the Plaintiff prayed that the application be dismissed with costs.

[3] Having considered the application, the averments in the Supporting Affidavit and Grounds of Opposition in the light of the pleadings and proceedings to date, is discernible that this suit was filed on **31 October 2013** by the Plaintiff against the Defendant for the payment of **Kshs. 10,156,960/=**, being the value of unpaid invoices for goods supplied and delivered, together with interest and costs. The Defendant was duly served with the Plaintiff along with Summons to Enter Appearance, and it accordingly entered appearance and filed its Defence herein as by law required. It is noteworthy that although the Defence was filed out of time on **15 January 2014**, without the leave of the Court, the Plaintiff, in its magnanimity, took no objection thereto, and proceeded to file a Reply to the Defence on **23 January 2014**.

[4] After the close of pleadings, the parties were expected to ensure compliance with the **Practice Directions Relating to Case Management in the Commercial and Admiralty Division of the High Court at Nairobi, Gazette Notice No. 5179 of 28 July 2014**, with a view of ensuring that the matter was ready for hearing. Thereafter, the matter was listed for Case Management Conference, notwithstanding that by **6 May 2015**, the Defendant was yet to comply with the requirement of Order as well as the Practice Directions. Accordingly, on the **19 June 2015**, the Court (**Kamau, J.**) made the following order:

"I have looked at the file and note that the Plaintiff has fully complied with the Practice Directions Kenya Gazette Notice No. 5179 of 28/7/14 as was directed by the court on 6/5/15 when the Defendant's Counsel was also present. The Plaintiff cannot be held at ransom by the Defendant who has also not filed its application for amendment as its Counsel informed the court. In the circumstances foregoing, I hereby certify this matter as ready for hearing. Matter will be mentioned on 27/11/15 with a view to giving a hearing date in 2016 as the court diary of 2015 is closed. The Defendant is hereby directed to file its witness statements cross-referencing documents it wishes to rely upon and the paginated Bundle of Documents within thirty (30) days from today. In the even the Defendant will not comply as aforesaid, its Statement of Defence filed on 15/1/14 will stand struck out unless of course the Defendant does not wish to call any witness or file any documents in support of its case..."

[5] The court record further shows that the Defendant did not comply with the above directions. It neither filed its Witness Statements, nor Bundle of Documents as ordered. Moreover, it neither sought to regularize its Defence that was filed out of time and without leave, nor did it timeously file its application for amendment of Defence to comport with the Court Order of **19 June 2015**. In the premises, the Defence that was filed herein dated **15 January 2014** stood struck out by **19 July 2015** and as such there is no Defence on record upon which the instant application may be premised.

[6] The foregoing being my view of the matter, I would find and hold that the application dated **3 May 2016** is totally misconceived and the same is hereby struck out with costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2017

OLGA SEWE

JUDGE