REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE. 287 OF 2015

HAKKEN CONSULTING LTD…….....……1ST PLAINTIFF

HAKKEN S.A…….…...……...2ND PLAINTIFF

CARLOS OLIVEIRA…….…….……..3RD PLAINTIFF

VERSUS

SEVEN SEAS TECHNOLOGIES LTD……...…..……....1ST DEFENDANT

SEVEN SEAS TECHNOLOGIES NIGERIA LTD…….....…2ND DEFENDANT

RULING

(No.2)

Introduction

1. This is the second of the opposed Motions filed by the parties. It was filed by the Plaintiffs.

2. The Motion seeks to strike out the Defense statement and for judgment to be entered as prayed. The motion was filed on 17 January 2017 while the Defense Statement in question was filed on 26 July 2016. The Defense was filed pursuant to the court's permission and leave granted on 18 July 2016.

3. The application raises, again, the question as to when a court may invoke its summary procedure as provided under Order 2 Rule 15 of the Civil Procedure Rules.

Background and Plaintiff's claim

4. The Plaintiffs instituted action against both Defendants by way of a combined summons and Plaint simply seeking judgment in the sum of USD 265,929.68 together with interest from the 15 day of May 2014. The claim was that the Defendants had received the sum of USD 265,929.68 but had failed to remit the same to the Plaintiffs. The claim was, in the alternative, based on an alleged promissory note issued by the Defendants to pay the Plaintiffs jointly and severally the sum of USD 265,929.68.

5. The genesis of the claim was as pleaded in paragraph 6(iv) of the Plaint.

6. The 2nd Plaintiff and the 1st Defendant are stated to have entered into a business Memorandum of

understanding in 2012 which is also stated to have terminated on 27 May 2013. It is further pleaded that on 25 November 2013, the Plaintiffs secured a contract with the First Bank of Nigeria PLC (" the Bank"). It was an information technology contract worth the sum of USD 326,497.50. The parties were apparently later to agree that the 2nd Defendant would invoice the Bank and upon receipt of the funds remit the same to the Plaintiffs. The Plaintiffs assert that they authorized the Bank to pay the 2nd Defendant the sum of USD 295,522.50 and that the Bank duly paid the 1st Defendant. The Plaintiffs also averred that through various email correspondence between the parties the Defendants admitted receipt of the funds from the Bank on behalf of the Plaintiffs but declined to pay the Plaintiffs.

The Defense

7. The Defendants filed a joint Defense.

8. The Defendants denied the Plaintiffs' claims and also questioned the court's jurisdiction on the basis that the 2nd Defendant was domiciled in Nigeria, thus outside the court's geographical jurisdiction. While admitting the Memorandum of Understanding, the Defendants denied the Plaintiffs' allegation as to invoicing and receipt of monies from the Bank. The Defendants also denied that there was an unconditional promise to pay the Plaintiffs any amount.

The Issue(s)

9. In their opposing affidavit the Defendants raise three distinct issues, namely; that the 2nd Defendant which is a separate entity from the 1st Defendant was never a party to the Memorandum of Understanding; that there was no privity of contract between the Plaintiffs and the 1st Defendant as far as the information technology contract was concerned and, finally, that the suit and claim was based on a letter of Award of the IT contract and not the Memorandum of understanding. The Defense also questioned the court's jurisdiction.

10. In their Defense, whilst asserting that the promise to pay was not unconditional, the Defendants contended that payment to the Plaintiffs was only to be made once the Bank was satisfied with the services rendered.

Jurisdiction issue

11. The issue as to the court's jurisdiction as challenged by the Defendants in the Defense Statement was dispositively dealt with by the court on 31 July 2017. The court affirmed its jurisdiction.

Arguments in court

12. Mr. Kago urged the Plaintiffs' case.

13. It was counsel's submission that the Defense was bare and amounted to a mere denial. Counsel stated that there was affidavit evidence that the Defendants had received monies and simply failed to remit, despite promises to pay.

14. Ms. Mwangi who urged the Defendant's cause was of the contrary view. Counsel submitted that the Defense statement raised various issues and as a joint defense, it could not be struck out. Counsel stated that the 2nd Defendant was never party to the Memorandum of Understanding upon which the Plaintiffs had based their claim. Counsel also insisted that the promise to pay was by the 2nd, not the 1st Defendant. Ms. Mwangi urged the court to be cautious prior to invoking the 'drastic' measure of striking out the Defence statement.

Analysis and Disposal

Order 5 Rule 15

15. The purpose of the Rule, no doubt, is to discourage unnecessary and unjustified defense statements. In my view, it helps to discourage defendants who are keen in setting up unreasonable defenses which stifle claims for no good reason. The rule also encourages plaintiffs to prompt the summary procedure of the court in obtaining judgment where the defense cannot hold.

16. Plaintiffs, who employ the procedure and seek to obtain judgment after the striking out of the Defense statement, must however not move the court where the Defendant has a bona fide defense. The Defense statement, to be struck out, ought to be as may not hold. It must not raise any bona fide triable issue: see **D.T Dobie & Co. Ltd *v* Muchina [1982] KLR 1** and **Job Kilach *v* Nation Media Group Ltd & Other [2015]eKLR.**

17. In **Ecobank Kenya Ltd –v- Merc bima International Ltd & 2 Others [2017] eKLR** the court stated that:

> ***[9]…courts of law always encourage determination of disputes on merit rather than through summary process. Thus in an application for striking out a defence statement for being frivolous or vexatious or not disclosing a reasonable cause of defence, the court ought to be strictly satisfied that the defence statement is untenable and raises no plausible triable issue of law or fact. An issue need not be one which the defendant must succeed on. It need only be a bona fide one which calls for judicial examination and trial: see*** Olympic Escort International Co. Ltd & 2 others v Perminder Singh Sandhu & Another [2009] eKLR***. 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 and only in cases where 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.***
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> ***[10]Effectively, the defence must not be evasive. It must not be bare or ambiguous. It must however answer the claim with substance and comprehensively. Where the defence is obviously unwinnable for the defendant and is bound to fail, where the defence is without any possible benefit to the Defendant and can only lead to a pointless and wasteful litigation then the defence will be struck out. It would appear contrary to the right of access to court but the power to strike out is always to be applied only in genuine and clear cases when it is obvious that any trial would provide no assistance. It is due to the inherent right of access to court, that the court will give an opportunity to the Defendant to amend where it appears that life may be injected in the apparently hopeless and hapless defence: see*** Wambua v Wathome & Another [1968] EA 40***.***

18. Is the joint Defense statement filed herein obviously unwinnable and of no possible benefit to the Defendants?

19. The Defendants' counsel has pointed out that the joint defense raises issues. The Defendants pointed to the question of whether the claim is pegged on the Memorandum of Understanding or the Letter of Award. The Defendants also insisted that there was no unconditional promise to remit the monies.

20. Without any specific detail on the Defendants' contentions, the Plaintiffs' counsel simply pointed to a letter allegedly constituting an admission of the claim.

21. A single issue, where raised bona fide, is adequate to defeat any application for summary procedure. I am not utterly convinced that the Defense Statement herein is unwinnable. The admissions relied upon by the Plaintiffs were not made by the 2nd Defendant. It would be inappropriate to wish this away, and enter judgment on basis of admission. That would lock out the 2nd Defendant's line of defense as the joint Defense statement would have to be struck out.

22. The legal consequence of striking out a joint defence is that all the Defendants are exposed to judgment against them, even where one defendant could have a reasonable defense. Yet, a single issue should see the court exercise restraint. In the instant case, I also do not view it that the defense was not singularly filed by the defendants to simply defeat the cause of justice.

23. The 2nd Defendant has, in my view, raised veritable issues including whether the promises made to pay were unconditional. I need not conduct a mini trial as to whether that is true or false at this stage.

24. With uncertainty as to the exact nature of the relationship between the parties it would be more appropriate and proportionate to let the Defense statement survive the instant application. I must however hasten to point out that, in my view, it would have been different if the Plaintiffs had filed an application for judgment on admission even in the face of a joint defense.

25. In the result, the application fails. Let the suit proceed to trial.

26. The application dated 17 January 2017 is dismissed with costs to the Defendants.

Dated, signed and delivered at Nairobi this 18th day of October, 2017.

J.L.ONGUTO

JUDGE