REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL& ADMIRALTY DIVISION

CIVIL SUIT NO. 169 OF 2015

L G ELECTRONICS AFRICA LOGISTICS FZE……..…PLAINTIFF

VERSUS

ENCAPSULATED EAST AFRICA LIMITED…….DEFENDANT

RULING

1. The Plaintiff/Applicant herein, LG Electronics Africa Logistics FZE filed the application dated **20th May, 2015** herein for orders that Summary Judgment be entered in its favour against the Defendant/Respondent as prayed for in the Plaint dated **11th October, 2014** and that costs of the application be provided for. The application is based on the following grounds:

1. **That the sum claimed is a liquidated sum together with interest.**
2. **That the Defendant/Respondent had entered appearance but had not yet filed a Defence.**
3. **That the Defendant/Respondent has no valid or real defence against the Plaintiff/Applicant's claim.**
4. **That the Defendant/Respondent has, in writing, explicitly acknowledged the debt that forms the sub-stratum of the Plaintiff's/Applicant's claim.**
5. **That any defence raised by the Defendant/Respondent would not raise triable issues and is intended merely to delay due process.**

2. The Application has been filed pursuant to Section 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya, Order 36 Rules 1 and 8 (1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and is supported by the Affidavit of the Applicant's Business Manager, **JOEL KAMUYU,** sworn on 20th May, 2015 together with the annextures thereto.
3. The suit itself was filed by the Applicant on 2nd April, 2015 by way of the Plaint dated 11th October, 2014, seeking judgment in its favour against the Defendant in the sum of US Dollars 120,397/42 together with interest and costs. The claim arises from a negotiated contract whereby the Applicant appointed the Respondent as its non-exclusive distributor of electronic goods in Kenya. Pursuant to that agreement, the Respondent would place orders with the Applicant via Local Purchase Orders (LPOs). The Applicant would upon receipt of the Respondent's LPO prepare and deliver a proforma invoice containing the specific terms and conditions of the sale, payment and delivery of the goods ordered for. Upon receipt of the pro forma invoice, the Respondent would consider the terms specified and if in agreement, sign, stamp and return the pro forma invoice to the Applicant.
4. It was further deponed by the Applicant that between December, 2011 and November, 2012 the Respondent placed various orders for electronic goods which were duly supplied by the Applicant

on terms that payment by telegraphic transfer would be made before delivery. The payment terms were thereafter re-negotiated to a 90 days credit system, otherwise known as open account.

5. The Applicant's cause of action is therefore that, in breach of the agreed terms of payment, the Respondent failed to make the requisite payments for delivered goods, such that by 11th October, 2014 when this suit was filed, the outstanding debt stood at USD 120,397/42. The Applicant further averred that the debt was acknowledged in writing by the Respondent as per the series correspondence and payment plan attached to the Supporting Affidavit and marked JKV & VI. It was thus the Applicant's contention that the Respondent, having acknowledged the debt in writing and having signed a payment plan and made part payment in accordance with the payment plan, cannot, in good faith, claim to have a valid defence, nor raise a counterclaim to the Applicant's claim; hence the application for Summary Judgment.
6. The Defendant/Respondent, Encapsulated East Africa Limited, opposed the application on the basis of their averments in the three documents filed herein namely;

a. **The Defence and set-off filed on 29th May, 2015.**
b. **The Replying Affidavit sworn by Stephen Ndung'u Mwangi on 11th July, 2015.**
c. **The Written Submissions and Amended Bundle of Authorities filed herein on 7th August, 2015 and 31st July, 2015 respectively.**

7. Whereas the Respondent conceded that it was appointed as a non-exclusive distributor for the Plaintiff's electronic goods, they posit that no formal or written agreement was executed between the parties; and that in the absence of a formal agreement the terms of appointment and dealings between the parties are not certain and require to be proved by way of evidence at the trial. More specifically, the Respondent averred that there are several triable issues raised in the Defence, Replying Affidavit and submissions which the Court should be inclined to proceed to hearing for namely;

a. **That the goods were supplied on terms that the Respondent would only make payments to the Applicant upon successful sale to third parties and receipt of funds.**
b. **The payments claimed under invoices 12651 and 12897 were made in full by the Respondent but that the Applicant failed to keep and render proper account thereof.**
c. **That the Promissory Note relied on by the Applicant was not unequivocal.**
d. **That the amount claimed by the Applicant were not due for payment within 90 days as alleged as it relates to unsold stock of EZ sign TV.**
e. **That the Respondent pleaded a set-off of Ksh 8,322,552/= being the full value of the unsold stock together with incurred importation, clearance, marketing and storage costs incurred on behalf of the Applicant.**
f. **That since the Applicant is in the process of making/receiving compensation by virtue of an insurance claim for compensation for the subject unsold stock, it is not entitled to the sums claimed herein.**

8. The Court has considered the averments in the Affidavit filed in support of the Notice of Motion dated 20th May, 2015 and the Replying Affidavit sworn by **Stephen Ndung'u** on 11th July, 2015 as well as the Written Submissions and the Amended List of Authorities filed herein by Learned Counsel.
9. The rationale for the Summary Procedure set out in Order 36 Rule 1 of the Civil Procedure Rule was well explained in **ICDC Vs DABER ENTERPRISES LIMITED [2000] I EA 75** thus:

"The purpose of the proceedings in an application for Summary Judgment is to enable the Plaintiff to obtain a quick judgment where there is plainly no defence to the claims."

10. To justify Summary Judgment therefore, the matter must be plaint and obvious and where it is not plain and obvious, there would be no justification for a party to a civil litigation to be deprived of his right to have his case subjected to a proper trial and determination on the merits.

11. The principles which guide the courts in determining applications of this nature are therefore fairly well settled.
12. **In Kenya Trade Combine Limited Vs Shah Civil Appeal No. 193 OF 1999** the Court of Appeal expressed itself thus with regard to the obligation of a Defendant in such an application:

> ***"In a matter of this nature all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect, a defence which raises triable issues does not mean a defence that must succeed."***

13. The application's main focus is the alleged admission per the document marked **JKIV** to the Supporting Affidavit. According to the Applicant that document, also referred to herein as a Promissory Note, amounts not only to an admission of the sum claimed, but sets out a payment plan that would have seen the Respondent pay the sums outstanding in 3 instalments as hereunder:

a. **1st payment of USD 54,007 before 15th April, 2013**
b. **2nd payment of USD 90,000 before end of May, 2013**
c. **3rd payment of USD 63, 700 before 15th July, 2013**

Total 207,707

14. It was further acknowledged by the Applicant that the Respondent did make some payment in accordance with the Promissory Note and that the debt was further reduced by certain sums that were due to the Respondent from the Applicant. This explains why the amount claimed herein is less than the total amount set out in the Payment Plan.
15. With regard to admissions, Madan, JA (as he then was) had this to say in the case of **Choitram Vs Nazari (1984) Klr 327**;

> ***"Admissions have to be plain and obvious, as plain as a spikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on to a definite contract. If matters not even if the situation is arguable even if there is a substantial argument, it is an ingredient of jurisprudence,provided that a plain and obvious case is established upon admission by analysis."***

16. A perusal of the emails surrounding the Payment Plan shows that goods were supplied by the Applicant to the Respondent which were not paid for within the 90 day open credit period. Thereupon, legal action was threatened by the Respondent, in response to which a meeting was held, discussions had and consensus reached as to payment in the form of the Payment Plan. On the face of it therefore, the Payment Plan has no explicit admission of any lump sum amount that was then due, so that when the Respondent argues that the proposed payments were hinged on the anticipated sale of the delivered stock, it becomes a triable issue. Additionally, it emerged that certain payments by the Respondent that were intended to reduce the outstanding invoices were diverted by the Respondent to clear other accounts that were not due.
17. The Respondent further drew the Court's attention to Paragraph 9 of the Plaint which shows that the Applicant, at some point in time, supported the Respondent in marketing some of their products. According to the Respondent, this amounted to an acknowledgment that the goods supplied to it by the Applicant were considered ***"sold"*** only upon "***actual sale"*** by the Respondent.
18. Also pertinent to the application is the set–off pleaded by the Respondent in the Defence, on the basis that some of the goods supplied have not been sold. The set-off includes certain sums of money paid by the Respondent for the importation, customs clearance, marketing and storage before it took delivery. The Applicant conceded that there was no obligation on the part of the Respondent to meet such costs, but posited that these were the attendant costs of doing business. Given the differing positions taken by the parties on the set off, this too becomes a triable issue. In

this regard, I find persuasive the following expressions of the Court in the English case of **Dary Vs RAC Motoring Services Limited [1999] I ALLER 1007;**

"The Court should be very wary of trying issues of fact on affidavit evidence where the facts were apparently credible and were to be set against the facts being advanced by the other side, since choosing between them was the function of the trial Judge, not the Judge on the interlocutory application…"

19. The same position was taken by the Court in **Shah Vs Padamshi (1984) KLR 531** thus:

"Except in the clearest of cases, which this one is not, it is inadvisable for the Court to prefer one affidavit to another in order to enter Summary Judgment. Summary Judgment is a drastic remedy to grant, for inherent in it is a denial to the Respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the Court strongly feels that the Defendant is unlikely to succeed at the trial. The Court must not attempt to anticipate that the Defendant will not succeed at the trial…"

20. An issue was also raised to the effect that the Applicant has already placed a claim with its insurer, Korea Trade Insurance Company – K-SURE, in respect of the unsold stock that is the subject of this suit; and that the compensation had been made or was in the process of being made as at the time the application was argued. It is the Respondent's position that to enter Summary Judgment in the Applicant's favour would thus amount to its unjust enrichment. The Applicant's response to this was that it was a speculative and unsubstantiated allegation. This is all the more reason why the issue should be subjected to trial at the hearing. Besides, if true, this contention would augment the Respondent's posturing that the ownership of the delivered goods did not pass from the Applicant until the goods were actually sold by the Respondent.
21. In the result, the Court is satisfied that, from the facts of this case the interests of justice would not be served by the entry at this stage of Summary Judgment in the Applicant's favour as has been sought. The Promissory Note relied on does not, to my mind, amount to a clear and unequivocal admission of the sum claimed herein. In the premises, there being valid triable issues raised by the Respondent to the claim, I would dismiss the Notice of Motion application dated 20th May, 2015 and direct that the substantive suit be heard and disposed of on the merits.
22. Costs of the application to be in the cause.

Orders accordingly.

OLGA SEWE

JUDGE

DATED, SIGNED and **DELIVERED** at **NAIROBI this 15th day of January 2016**

FRED OCHIENG

JUDGE