



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 177 OF 2015

MAGIC CHEMICALS INC.....PLAINTIFF

-VERSUS-

PRAPID ENTERPRISES LIMITED (E.A) LIMITED.....DEFENDANT

RULING

1. There are two Applications before this Court for determination. The first one is the Plaintiff's Notice of Motion dated **8th October, 2014** and filed on **10th October, 2014**. It is expressed to be brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** as well as **Order 13 Rule 2** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**.
2. The Plaintiff sought for the following orders:-
 1. **THAT judgment be entered for the Plaintiff as pleaded in its Plaint on the Defendant's own admission of indebtedness to the Plaintiff.**
 2. **THAT the costs of the suit and this Application be awarded to the Plaintiff.**
3. The application is based on the grounds set out therein and is supported by the Affidavit of **GURVINDER S. BAWA**, sworn on **9th October, 2014**.
4. It is the Plaintiff's case that the Defendant has admitted to owing them the sum of US\$ 70,350 in their statement of Defence filed on **13th February, 2014**. The Plaintiff averred that the Defendant had also admitted to owing the said amount through emails exchanged between the parties. Further, that the Defendant in another suit pending before the High Court, being **Milimani HCCC No. 565 of 2013: Pradip Enterprises (EA) Ltd vs Magic Chemicals Ltd**, had admitted to owing the said amount in its Plaint. In the circumstances, it is the Plaintiff's case that requiring this suit to go to trial will cause it prejudice. Accordingly, the Plaintiff urged the Court that it was in the interest of justice to dispose the suit on the basis of the Defendant's admission.
5. In response to the application, the Defendant filed a Notice of Preliminary Objection dated **24th October 2014** as well as a Replying Affidavit sworn on **24th October, 2014** by **ALLEN WAIYAKI GICHUHI**, an Advocate of the High Court of Kenya. The Defendant objected to the Plaintiff's application on grounds that the Chief Magistrate's Court did not have pecuniary jurisdiction to deal with the matter in light of the set-off pleaded in the Defence; and that the Defendant had filed an application for the transfer of the suit to the High Court. The foregoing was reiterated in the Defendant's Replying affidavit.

6. It is noteworthy that the application for judgment on admission was filed by the Plaintiff in the Chief Magistrate's Court (**Milimani CMCC No. 8096 of 2013**). Subsequently, by an order of the court dated 12th February 2015 made in High Court Miscellaneous Application No. 504 of 2014, the Chief Magistrates Court File No. CMCC No. 8096 of 2013 was transferred to the High Court under the current number HCCC No. 177 of 2015. In the premises, the preliminary objection as raised by the Defendant herein has been overtaken by events.
7. The second application is the Defendant's Notice of Motion dated **21st April, 2015** and filed on even date. It is expressed to be brought under **Sections 1A and 1B of the Civil Procedure Act, Order 7 Rule 3, Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules**.
8. The Defendant sought for the following orders:-
 - 1) **The Defendant be granted leave to amend its Defence as per the Draft Amended Defence and set-off exhibited in the Affidavit in support of the application.**
 - 2) **The costs of the Application be provided for.**
9. The application is based on the grounds set out therein and is supported by the affidavit sworn on **21st April, 2015** sworn by MANOJ SHAH, a Director of the Defendant Company.
10. The Defendant avers that at the time the Defence herein was filed, it had been anticipated that the present suit would be transferred and consolidated with **HCCC No. 565 of 2013: Pradip Enterprises Ltd vs Magic Chemicals Ltd**, where all issues, including set-off would be ventilated. However, the High Court dismissed the application for consolidation.
11. It is the Defendant's case that the annexed Amended Statement of Defence and Set-off specifically answers the allegations raised in the Plaint and that it is in the interest of justice that the application be allowed to enable the Court appreciate all the facts relevant to the suit to make a just and fair determination.
12. In response to the application, the Plaintiff filed a Replying affidavit sworn by its President, **DR. TEJENDERA K.BAWA** on **18th June, 2015**. The Plaintiff averred that the proposed amendments in the annexed Amended Draft Defence which sought to introduce a set-off, was a substantive claim that was pending before Court in **HCCC 565 of 2013** in which the Defendant herein was the Plaintiff. The Plaintiff further averred that the claim in the aforesaid suit and the claim in the present suit arose from two separate and distinct contracts. It was therefore the Plaintiff's position that the suit in **HCCC 565 of 2013** and the present one were entirely unrelated. The Plaintiff referred to a ruling of this Court made on **16th September, 2014** in which the Defendant's application seeking the consolidation of the two suits was dismissed on the grounds that the causes of action were distinct and separate.
13. I have considered the pleadings herein as well as the written submissions by Counsel in support and opposition to the application. I will begin with the second application for amendment of Defence. The general rule is that the Court has a wide discretion to allow amendment of pleadings so long as the said amendments are necessary for the determination of the real issues in controversy in the suit and provided there is no prejudice occasioned to the other party. In *Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76*, the point is made thus:-

"...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion...The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side..."

The above insight can also be found in the Court of appeal case of **Central Kenya Ltd -vs- Trust Bank Ltd & 5 others [2000]eKLR**, in which the Court rendered itself as follows:-

“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties... The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

14. I have perused the Plaintiff filed in **HCCC 565 of 2013** by the Defendant herein vis-à-vis the proposed amendments sought to be introduced in the present suit. It is apparent that the proposed set-off has been adequately pleaded in **HCCC No. 565 of 2013**, where the Defendant is the Plaintiff. The Defendant has actually reiterated the case in **HCCC No. 565 of 2013** in its proposed amended defence. The aforesaid case is still pending in Court. In essence therefore, the issues that the Defendant herein seeks to be determined through the set-off are issues pending determination before another Court of competent jurisdiction.
15. Additionally, the Plaintiff's contention is that the suit in **HCCC 565 of 2013** was unrelated to the present suit as the claims therein arose from two separate and distinct agreements, which position was buttressed by the Court in its Ruling dated 16 September, 2014. Accordingly, the Application for amendment of Defence is untenable.
16. The second application is the Plaintiff's application dated 8 October 2014, seeking for judgment on admission pursuant to **Order 13 rule 2** of the **Civil Procedure Rules**, which provides that:-

“Any party may at any stage of the suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgement or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgement, as the court may think just.” (Underlining supplied)

17. At Paragraph 13 of the Plaintiff filed in **HCCC 565 of 2013**, the Plaintiff who is the Defendant in the present suit averred as follows:-

“The Plaintiff is entitled to set-off against the sum, (sic) the sum of US \$ 70,350 [Kshs. 6,120,450 using the rate of Kshs. 87 to the dollar] owed to the Defendant on a separate contract towards reimbursement of its refund leaving a shortfall of Kshs. 126,182.” (Emphasis supplied)

At paragraph 20 (a) of that Plaintiff, the Defendant herein unequivocally conceded that the sum of US\$ 70,350 was owing and due to the Plaintiff herein.

18. In view of the foregoing, there is a plain and unequivocal admission by the Defendant herein that it owes the Plaintiff a sum of **USD 70,350**. In the case of **Choitram Vs Nazari (1984) KLR 327** Madan JA (as he then was) stated as follows regarding admissions: -

“Admissions have to be plain and obvious, as plain as a pikestaff 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 admissions must leave no room for doubt...”

The court is satisfied that the admission of the aforesaid sum is clear enough from the pleadings as to entitle the Plaintiff to immediate judgment on admission. What was disputed was the payment of interest thereon at commercial rates.

19. In view of the foregoing, the following are the orders of the Court:-

- a. The Plaintiff's Notice of Motion dated **8th October, 2014** and filed on **10th October, 2014** is

merited and Judgment is therefore entered for the Plaintiff for the sum of USD 70,350 with costs based on the Defendant's admission to owing the same. However, the issue of interest having been disputed remains outstanding pending determination on merits.

- b. The Defendant's Notice of Motion dated **21st April, 2015** and filed on even date seeking for amendment of the Defence and introducing a set-off is hereby dismissed with costs.

Orders accordingly.

RULING SIGNED DATED AND DELIVERED AT NAIROBI 24TH THIS DAY OF MARCH 2016

OLGA SEWE

JUDGE